

91-810

Supreme Court, U.S.

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No. _____

In The
Supreme Court of the United States
October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI AND
APPENDIX, VOLUME I, PAGES 1-117

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QUESTIONS PRESENTED

- I. Does the failure of environmental citizen suit plaintiffs to comply strictly with statutory pre-suit notice and delay requirements applicable to their actions require dismissal on either jurisdictional or procedural grounds?
- II. May a district court in a citizen suit action award a fully compensatory and enhanced attorney's fee where a citizen suit plaintiff obtains no relief or nominal relief?
- III. Does §1311(a) of the Clean Water Act regulate the passage of previously polluted water through a discernable, confined and discrete conveyance?

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PETITION FOR WRIT OF CERTIORARI
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The City of Burlington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-37) is reported at 935 F.2d 1343. The opinion of the district court dated October 16, 1989 (App. 59-115) is reported at 732 F.Supp. 458. The opinion of the district court dated March 15, 1990 (App. 118-129) is reported at 733 F.Supp. 23. The balance of the court of appeals and district court opinions

and orders (App. 38-58, 116-117, 130-146) are not reported.

JURISDICTION

The opinion of the court of appeals was entered on June 12, 1991. A timely motion for reargument was denied on August 20, 1991. (App. 145). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are set out verbatim in the Appendix:

United States Constitution

Article I, Section 1

Article III, Section 1

Article III, Section 2

Sections 301(a), 307, 402, 502, and 505 of the Clean Water Act (33 U.S.C. §§1311(a), 1317, 1342, 1362, and 1365).

Sections 3002, 3005, 3006, 3008, 3010, 4005 and 7002 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§6922, 6925, 6926, 6928, 6930, 6945, and 6972).

STATEMENT OF CASE

Starting in the 1950's and continuing until January 1, 1990, the petitioner, the City of Burlington, Vermont, ("City") operated a municipal landfill adjacent to a wetland known as the Intervale. The Intervale is bisected by a railroad embankment. Running through the railroad embankment is a large stone culvert which connects the marsh on either side of the embankment. Depending

upon conditions, the waters of the marsh may flow in either direction through the culvert, but the usual flow pattern is from south to north. The culvert is separated from the landfill mass itself by the waters of the marsh lying south of the railroad embankment, known as the Beaver Pond.

Leachate is generated within the landfill. Although the leachate produced in the landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA, the concentrations of those chemicals and compounds do not exceed state or federal prohibitions. Tests performed on samples of pure leachate taken from the landfill indicate that it is toxic to a small fish called the fathead minnow, daphnia (water fleas) and algae.

Because the landfill is unlined, some of the leachate escapes the collection system by entering the upper gradients, or "flow tubes", of groundwater under the landfill. The groundwater flows north beyond the landfill boundary, and the flow tubes of the leachate-contaminated groundwater all surface in the Intervale, north of and within 300 feet of the railroad embankment. Until late in 1985, leachate would also occasionally emerge from the sides of the landfill via seeps. From there it would flow into the Beaver Pond. Any pollutants from the landfill which might enter the waters of the marsh have already done so before those waters flow through the culvert.

In the early 1980's the State of Vermont began to scrutinize the landfill closely. In January of 1981 the City and the state entered into an Assurance of Discontinuance, which was subsequently amended on January 31, 1985 to provide *inter alia*: (1) for possible operation of the

landfill until January 1, 1990; and (2) a requirement that the City install a leachate collection system by September 1, 1985, and a methane control system by December 1, 1985. This amended assurance was entered as an order of the state court, pursuant to Vermont's Administrative Procedure Act, on March 7, 1985.

Engineering plans for the leachate and methane systems were approved by the state in August, 1985. On September 5, 1985, the City advertised for bids for the construction of the systems. On November 11, 1985, the City entered into a contract for the construction of the systems, which commenced shortly thereafter. The methane gas control system began operation on December 27, 1985, utilizing temporary blowers. The leachate collection system, though not yet complete, began operations on January 15, 1986. By March 25, 1986, both systems had been completely installed and were operational, as designed.

Plaintiffs filed their ten-count complaint and a motion for a preliminary injunction on October 9, 1985, at 10:00 a.m. Both the complaint and the motion for a preliminary injunction sought immediate closure of the landfill among other extensive injunctive relief. The complaint included *inter alia*: in Counts I and II, a citizen suit action pursuant to 42 U.S.C. §6972(a)(1)(A) alleging violations by the City of 42 U.S.C. §6925 and §6930; in Count III, a citizen suit action pursuant to 42 U.S.C. §6972(a)(1)(B) alleging that because of the violations alleged in Counts I and II, the landfill may present an imminent and substantial endangerment to health or the environment; in Count IV, a citizen suit action pursuant to 33 U.S.C. §1365 and in Counts V through X, actions based on alleged violations of state law. Federal jurisdiction was alleged to exist with respect to Counts I through III pursuant to 42 U.S.C. §6972 and with respect to Count IV pursuant to 33 U.S.C.

§1365.¹ While the complaint invoked those statutes as a basis for jurisdiction, it did not allege that plaintiffs had given the pre-suit notice to the EPA administrator, the state and the City, which those statutes require, nor did it allege that applicable delay periods had been observed. Instead, the complaint merely alleged with respect to each count that since each of the entities had actual or constructive knowledge of the violations alleged, further notice by plaintiffs would be meaningless.²

Defendant filed a motion to dismiss for lack of jurisdiction based upon the failure of the plaintiffs to comply with the notice and delay requirements applicable to their actions.³ The magistrate, to whom the case had been assigned, reserved decision on the motion to dismiss after ordering plaintiffs to file a "proper notice",⁴ *see* docket

¹ Pendent jurisdiction was alleged with respect to Counts V through X.

² See paragraphs 59, 72, 81 and 86 of plaintiffs' complaint, App. 244.

³ The motion to dismiss was based on two grounds: (1) that the plaintiffs had failed to give actual notice, as required, to the City, the state and the EPA administrator before commencing their actions, and (2) even if notice could be deemed to have been given by the filing of the complaint, the plaintiffs could not qualify for exceptions to the delay requirements: (a) with respect to their RCRA actions, because, as a matter of law, no action could be maintained for a violation of any provisions of subchapter III since those provisions had all been superseded by Vermont's approved hazardous waste program; or (b) with respect to the CWA action because, despite plaintiffs' allegation of violations of 33 U.S.C. §1317, only actions respecting violations of §1317(a) triggered the exception to the delay period and that section of the statute imposed obligations only on the EPA administrator, not the City.

⁴ Thereafter, on November 5, 1985, plaintiffs' attorney filed an affidavit (App. 270) indicating that on October 8, the

(Continued on following page)

entry of October 28, 1985 (App. 140), and proceeded with hearings on plaintiffs' motion for a preliminary injunction.

The court subsequently denied both the original motion to dismiss and several reassertions thereof advanced by the City throughout the period of time that these citizen suit actions were pending before the district court.

On March 26, 1986, the court issued an order (App. 40) denying the motion for a preliminary injunction, but ordering the City to install the leachate and methane systems within 60 days. As previously indicated, *supra* at 4, the City had already accomplished what the court ordered before the order issued.⁵

After a trial by court with respect to Counts I through V⁶ of the complaint on October 16, 1989, the district court issued its opinion and order providing:

(Continued from previous page)

day before the complaint was filed, he had placed first class letters (see copy at App. 273) in the mail addressed to the City, the state, and the EPA Administrator notifying those parties of alleged violations of 42 U.S.C. §6925, §6930 and §6945, and violations of 33 U.S.C. §1311, §1317, and §1342. Attached to the affidavit was a letter dated November 5, 1985 (see copy at App. 275) purporting to be the supplemental notice ordered by the magistrate. The "supplemental notice" only refers to those statutory violations listed in the October 8, 1985 letter. At no time have plaintiffs averred or offered proof that the October 8 letters were delivered before their complaint was filed. Likewise, the plaintiffs have at no time averred or offered proof that they notified the City, the state or the EPA of a claimed "endangerment" as required in connection with their 42 U.S.C. §6972(a)(1)(B) action.

⁵ The court of appeals decision erroneously states that the leachate and methane systems were not installed until after the March 26, 1986 order, *see* App. 8 and 20, but *see* District Court Opinion of October 16, 1989 (App. 59 at 75) and Affidavit of Steven Goodkind (App. 277).

⁶ Count V alleges violation of Vermont's Groundwater Protection Act.

(1) With respect to Count I, that plaintiffs' allegations of RCRA subchapter III violations were not actionable because, pursuant to 42 U.S.C. §6926(b), Vermont's approved hazardous waste plan operated in lieu of and superseded the prohibitions contained in subchapter III;

(2) With respect to Count II, that the City had violated 42 U.S.C. §6945 by (a) generating methane gas in violation of regulations issued pursuant to subchapter IV of RCRA, but had abated that practice on or about December 27, 1985⁷ and since then had not violated that provision; and (b) because it found the City in violation of Clean Water Act prohibitions, as alleged in the CWA citizen suit action, that the City was, *ipso facto*, in violation of subchapter IV RCRA provisions;

(3) With respect to Count III, that the landfill may present an imminent and substantial endangerment to health or the environment;⁸ however, the court did not identify any specific endangerment or explain why whatever it perceived the endangerment to be was imminent and substantial.

(4) With respect to Count IV, the court held that the City had violated 33 U.S.C. §1311(a) of the Clean Water

⁷ December 27, 1985 is the date on which the methane control system became operative.

⁸ The court of appeals erroneously states that the district court found the City to be in violation of subchapter III and subchapter IV as the result of the district court's finding that the landfill presented an imminent and substantial endangerment. (App. 9) In fact, the court did not find the City to have been in violation of subchapter III of RCRA but, as previously indicated, found the provisions of subchapter III to be inapplicable to the City.

Act by discharging pollutants from a point source (the railroad culvert) into the Intervale without a permit;

(5) As to Count V, the court found the City to be in violation of Vermont's Groundwater Protection Act.

The order required the City to close the landfill by January 1, 1990, the same closing date required by the March 7, 1985 state court order, but did not grant any of the relief sought by the plaintiffs in their action. The court further found, without a hearing on the subject, that the plaintiffs were prevailing parties entitled to attorney's fees to be determined.

Thereafter, the City renewed its motion to dismiss for lack of jurisdiction, which the court denied. (See order of March 15, 1990, App. 118). The court then proceeded to enter judgment pursuant to its order of October 16, 1989, awarding plaintiffs' attorney's fees in the fully compensatory amount of \$198,027.50 plus a 25% risk/contingency enhancement of \$49,506.87. The court also awarded plaintiffs \$10,929.66 in expenses, including expert fees.

On appeal, the Second Circuit affirmed the decisions of the trial court in all respects:

(1) It upheld the jurisdiction of the lower court, holding that plaintiffs had adequately complied with the notice and delay requirements applicable to their citizen suit actions.

Each of plaintiffs' three citizen suit actions is subject to differing notice and delay requirements. Commencement of plaintiffs' 42 U.S.C. §6972(a)(1)(A) action is prohibited by the provisions of §6972(b)(1)(A) prior to 60 days after plaintiffs give notice of violations to the EPA administrator, the state and the City, except that actions

respecting a violation of subchapter III⁹ may be brought immediately after notice is given. The 42 U.S.C. §6972(a)(1)(B) action is, by the terms of §6972(b)(2)(A), prohibited until after notice of the endangerment¹⁰ is given and a 90 day delay period is observed, except no delay is required if the action respects a subchapter III violation. The 33 U.S.C. §1365(a) action is prohibited by §1365(b) unless plaintiffs give 60 days prior notice of the violations alleged. The delay period is waived if the action is one respecting a violation of §1316 and §1317(a).¹¹

The Second Circuit opinion employs a discretionary, pragmatic approach to the application of these notice and delay requirements. Holding that this case "involves hazardous wastes," the court declared that "rigid adherence" to the notice and delay requirements "would lean too far, for it would circumvent congress's [sic] intent in enacting these statutes." (App. 16). Having determined not to

⁹ Subchapter III of RCRA is found at 42 U.S.C. §§6921 through 6934.

¹⁰ The Second Circuit opinion either overlooks or ignores the requirement of §6972(b)(2)(A) that plaintiffs give pre-suit notice of the alleged endangerment upon which their §6972(a)(1)(B) action is based. See Second Circuit opinion (App. 12) where the court erroneously states: "Section 6972(b)(2), which applies to actions brought pursuant to subsection B of §6972(a)(1), provides for a 90-day delay, but is similar to §6972(b)(1) in all other respects." *Contrast*, Opinion and Order of District Court, March 15, 1990, App. 118, 124-128.

¹¹ Plaintiffs did not plead a violation of §1316. Section 1317(a) does not impose obligations on the City and, therefore, an allegation of its violation is insufficient to trigger the exception to the delay period. See Second Circuit Opinion, App. 20-21; accord *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096, 1098 (11th Cir. 1991).

apply the notice and delay requirements strictly, the court proceeded to analyze whether plaintiffs adequately complied with the requirements with respect to Count I (the plaintiffs' §6972(a)(1)(A) action alleging violations of §6925 and §6930). Exercising discretion, the court held that the mailing of the October 8, 1985 letter, even though there was no evidence of delivery before suit was commenced, was sufficient to comply with the notice requirement (App. 12). It also concluded that the mere allegation of subchapter III violations in Count I was sufficient to trigger the exception to the delay requirement, even though the allegation was determined to be non-actionable because subchapter III was, pursuant to 42 U.S.C. §6926(b), superseded by Vermont's approved hazardous waste program.^{12, 13}

¹² RCRA provides for approval of qualified state hazardous waste programs by the EPA administrator and dictates that a state having such an approved program "is authorized to carry out such program in lieu of the federal program under this subchapter." 42 U.S.C. §6926(b). The district court determined that Vermont has, as of January, 1985, an approved hazardous waste program which operates in lieu of the federal program; that the regulatory requirements under RCRA are superseded by the state regulations; and that a plaintiff seeking to challenge the operation of a hazardous waste site must bring their action under state, not federal, law. (App. 71).

¹³ It is difficult, if not impossible, to reconcile the court of appeals' holding that an allegation of a violation of subchapter III, which is not applicable to the City because it has been superseded, is sufficient to trigger the exception to the RCRA delay period with its holding that an allegation of a violation of §1317(a) is insufficient to trigger the exception to the CWA delay period because that section is not applicable to the City. (See Second Circuit opinion, App. 20-21).

Having thus established that jurisdiction existed with respect to Count I, the court employed a "hybrid complaint" theory to pragmatically waive the notice and delay requirements applicable to the remainder of the plaintiffs' citizen suit actions. Thus, it waived the delay requirement applicable to plaintiffs' §6972(a)(1)(A) action based upon alleged violations of 42 U.S.C. §6945 (Count II), it waived the notice and delay requirement applicable to the Count III, 42 U.S.C. §6972(a)(1)(B) action,¹⁴ and it waived the delay requirement applicable to the Count IV, 33 U.S.C. §1365(a) action.

In upholding jurisdiction over Count I of the complaint, the court of appeals also impliedly extended the jurisdictional grant contained in §6972 with respect to §6972(a)(1)(A) actions. The statute only grants the district court jurisdiction "to enforce the permit, standard, regulation, condition, requirement, prohibition or order referred to in paragraph (1)(A)." Paragraph (1)(A) refers to "any permit, standard, regulation, condition, requirement, prohibition, or order *which has become effective pursuant to this chapter*" (emphasis added). Since subchapter III was found not effective¹⁵ it would appear that §6926(a) jurisdiction would not extend to Count I of the complaint.

¹⁴ There is not even a pretense in this case that plaintiffs gave notice of an "endangerment" as required by §6972(b)(2)(A). Neither the letter notice of October 8, 1985 (App. 273) nor the "supplemental notice" (App. 275) mention or refer to an endangerment or a violation of §6972(a)(1)(B). The Second Circuit either considered this omission a "technicality" (App. 21), or misread the applicable statutory requirements, *see* footnote 10 *supra*.

¹⁵ See district court opinion of October 16, 1989 (App. 59).

(2) It upheld the award of enhanced attorney's fees, holding that the lower court's declaration that violations of the statutes had occurred constituted a change in the legal relationship of the parties entitling plaintiffs to prevailing party status.¹⁶

(3) Despite its acknowledgement that "any pollutants in water flowing through the culvert have already entered waters of the United States before they flow through the culvert," (App. 22) the court of appeals upheld the trial court determination that the City was violating §1311(a) of the Clean Water Act.

(4) The circuit court denied the City's challenge that there was insufficient evidence to support the lower court's conclusion that the landfill presented an imminent and substantial endangerment. It did so by determining to give no meaning to the words "imminent" and "substantial" and reading the statute as authorizing judicial intervention to eliminate *any* risk posed by toxic wastes.

REASONS FOR GRANTING CERTIORARI

Review should be granted because the court of appeals' decision, departing from established principles, expands the jurisdiction of the district court beyond that granted by Congress by failing to construe and apply strictly the notice and delay requirements applicable to plaintiffs' citizen suit actions. In so doing, the Second Circuit joins the circuits among which there is a split of

¹⁶ The court of appeals also speculated that, but for the district court order, the City would not have complied with the state court order to close the landfill by January 1, 1990.

opinion as to whether the notice and delay requirements are jurisdictional. The discretionary and pragmatic application by the Second Circuit of the mandatory notice and delay requirements also conflicts with this Court's recent decision in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

The opinion incorrectly concludes that plaintiffs, who obtained no relief as a result of their lawsuit, were prevailing parties entitled to fully compensatory and enhanced attorney's fees and expenses. By so holding, the circuit court's opinion conflicts with applicable decisions of this Court in *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1 (1988), and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). To the extent that it can be said that plaintiffs obtained relief, such relief was nominal at best. By awarding attorney's fees where only nominal relief has been granted, the court of appeals' decision conflicts with the Fifth Circuit's holding in *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991).

The Second Circuit's failure to reduce the lodestar amount in this case, where plaintiffs obtained only limited success at best, ignores this Court's instruction in *Hensley v. Eckerhart*, 401 U.S. 424 (1982). Further, the grant of enhanced attorney's fees both conflicts with *Hensley, supra* (limiting enhancement to instances of exceptional results), and, to the extent that the court applied a contingency/risk analysis based upon the risk associated with this case, as opposed to an analysis of the market treatment of contingent fee cases as a class, its opinion creates a conflict with the holdings of the Third, Fourth, Eleventh and District of Columbia Circuits with respect to the circumstances in which enhanced fees may be awarded.

Finally, the court's opinion invokes an interpretation of the Clean Water Act which is contrary to the plain language of the Act and is in conflict with the holdings of the Sixth, Eighth and District of Columbia Circuits.

**I. THE CIRCUIT COURTS ARE IN HOPELESS DIS-
ARRAY ON THE ISSUE OF HOW THE NOTICE
AND DELAY REQUIREMENTS COMMON TO
FEDERAL ENVIRONMENTAL CITIZEN SUIT
ACTIONS ARE TO BE APPLIED BY THE FEDERAL
COURTS. THE OPINION OF THIS COURT IN
HALLSTROM V. TILLAMOOK COUNTY,
DESIGNED TO BRING ORDER AND UNIFORM-
ITY TO THIS ISSUE, HAS BEEN SO LIMITED BY
THE SECOND CIRCUIT IN THIS CASE AS TO
RENDER THAT DECISION USELESS AS A MEANS
OF RESOLVING THE CONFLICT.**

A. Jurisprudential Background.

The Second Circuit's discretionary and pragmatic application of the notice and delay requirements in this case is not new. Since enactment of the environmental citizen suit statutes, the construction and application of the notice and delay requirements common to those actions have troubled the courts. By 1989 a clear split had developed among the Circuit Courts. The First,¹⁷ Sixth,¹⁸ Seventh¹⁹ and Ninth²⁰ Circuits had held that the notice

¹⁷ *Garcia v. Cecos Intern., Inc.*, 761 F.2d 76 (1st Cir. 1985).

¹⁸ *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985).

¹⁹ *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

²⁰ *Hallstrom v. Tillamook County*, 844 F.2d 598 (9th Cir. 1987).

and delay requirements were jurisdictional in nature. Those circuits, applying traditional principles with respect to the construction and application of jurisdictional statutes, held that a failure of the plaintiff to strictly comply with the notice and delay requirements mandated dismissal of their actions. The Third Circuit,²¹ on the other hand, determined that the notice and delay requirements were merely procedural in nature, and could be applied with discretion and pragmatism. It concluded, therefore, that a plaintiff's failure to comply with the requirements does not require dismissal of their actions.

In the midst of this discord among the circuits, this Court issued its opinion in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). Without deciding whether the requirements of notice and delay were jurisdictional, but specifically upholding the principles of strict construction of and strict adherence to the notice and delay requirements, the Court issued a clear mandate, holding that:

The notice and . . . delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizens suit provisions; a District Court may not disregard these requirements at its discretion.

Id. at 31. Rejecting the pragmatic approach the *Hallstrom* decision further held:

Where a party suing under the citizens suit provisions of RCRA fails to meet the notice and 60 day delay requirements of 6972(b), the district

²¹ *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 644 F.2d 995 (3d Cir. 1981); *accord Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir. 1985).

court must dismiss the action as barred by the terms of the statute.

Id. at 33.

Given the clear, strong language utilized by the Court – especially in light of the Court’s recognition that notice and delay provisions are common to citizen suit statutes, *id.* at 23, and its announcement that after the decision in *Hallstrom* “courts will have no need to make case by case determinations of when or whether failure to fulfill the notice requirement is fatal to the party’s suit,” *id.* at 32 – it might reasonably be concluded that the Court had effectively resolved the dispute among the Circuits as to whether the notice and delay requirements must be strictly construed and applied. Nevertheless, both the District Court and the Second Circuit in this case, holding that *Hallstrom* was limited to RCRA actions brought before the 1984 amendments, have proceeded to apply the notice and delay requirements in an expansively pragmatic manner. Meanwhile, the Fifth Circuit, in a post-*Hallstrom* RCRA decision, concluded that the notice and delay requirements are mandatory, per *Hallstrom*, but not jurisdictional. *Sierra Club v. Yeutter*, 926 F.2d 429, 437 (5th Cir. 1991). The Eleventh Circuit, in reliance on *Hallstrom*, has required strict adherence to Clean Water Act citizens suit notice and delay requirements. *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096, 1099 (11th Cir. 1991).

Since *Hallstrom*, therefore, the strict adherence versus pragmatic approach conflict continues to divide the circuits. In addition, a split has developed between the circuits respecting the scope of the *Hallstrom* decision itself, with the Fifth and Eleventh Circuits recognizing that the *Hallstrom* mandate applies to citizens suit actions

generally and requires a strict application of the notice and delay requirements, while the Second Circuit views *Hallstrom* as being severely limited and allowing a continued application of the pragmatic approach to the notice and delay requirements in actions other than those involving the pre-1984 amendment RCRA provisions.

B. The Notice and Delay Requirements are Jurisdictional and Must Be Strictly Construed and Applied.

The citizen suit statutes “could not be clearer”, *Hallstrom*, 493 U.S. at 26, in their prohibition of commencement of actions until after the notice and delay requirements are met by a plaintiff. The issue of whether those requirements are jurisdictional should be easily resolved – they are jurisdictional because compliance with the requirements is what distinguishes citizens who have standing to sue from those who do not.²² Standing is an essential element of jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (a plaintiff must be “a proper party to request an adjudication”). It must be established in every case. *Whitmore v. Arkansas*, 495 U.S. 149, ___, 109 L.Ed.2d 135, 144, 145 (1990) (“A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing”). While the issue of standing usually arises in the context of the case or controversy limitations of Article III of the Constitution,

²² For a discussion of a similar jurisdictional issue to that raised by this case, see, *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 67 (1987) (Scalia, J. concurring).

the question is no less important where standing is statutorily controlled by Congress, see e.g. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (federal court had no jurisdiction where plaintiff had no standing to appeal under Administrative Procedure Act).

District courts are congressionally created inferior federal courts under Article III of the Constitution. The legislative power, reserved to Congress by Article I of the Constitution, to ordain and establish inferior courts "includes the power of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerby v. Phillips*, 319 U.S. 182, 187 (1943). Especially where a jurisdictional statute is involved, basic concepts within the separation of powers doctrine require that the judicial branch construe and apply the statute strictly with a view to limiting the exercise of jurisdiction to those cases clearly authorized by Congress. Thus, this Court has repeatedly held that jurisdictional statutes are to be strictly construed. See, e.g. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (jurisdictional statutes must be construed "with precision and fidelity to the terms by which Congress has expressed its wishes"); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (strict and limiting construction required regarding statutory restrictions on amount in controversy); *Romero v. International Terminal Operating Company*, 358 U.S. 354, 357 (1959) (Supreme Court has a "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes").

C. *Hallstrom v. Tillamook County* appears to have been inappropriately limited by the Second Circuit.

The decision of this Court in *Hallstrom v. Tillamook County* would appear, on its face, to control the notice and delay issues extant in this case and require its dismissal. Viewed as strict procedural requirements, plaintiffs did not comply with either the notice or delay requirements applicable to their citizen suit actions. (See discussion regarding compliance, *supra* at 10-11).

The District Court and the Second Circuit reached the conclusion, however, that the *Hallstrom* mandate is only applicable to RCRA actions brought before the Act's 1984 amendment which provided for a single exception to the delay requirement. They then proceeded to conclude that following the 1984 amendments, the pragmatic approach, rejected by this Court in *Hallstrom*, is required in order to serve congressional intent with respect to both the notice²³ and delay requirements.

There is nothing about the 1984 amendments, however, to suggest a wholesale reversal of the Congressional intent as found by this Court. *Hallstrom*, 493 U.S. at 28-29. Nor is there any apparent reason to conclude that the principals of strict construction and application of the notice and delay requirements should be reversed after the 1984 amendments. The limited exception to the delay

²³ Strict adherence to the notice requirements would "thwart congress's [sic] purpose of providing an exception to the strict notice requirements in instances involving the heightened danger and immediacy of hazardous wastes." (Second Circuit Opinion, App. 21-22).

periods which the amendments introduce is couched in language which implies that Congress had no intent to change the notice requirement – “except that such action may be brought immediately *after such notification* in the case of an action respecting a violation of subchapter III . . . ”. (emphasis added). Furthermore, as to the delay requirement, the language of the amendment is poorly chosen if the Second Circuit view is correct. If Congress had really intended that the 1984 amendment have the effect found by the court of appeals, it could easily have conditioned the exception using words such as “in the case of an action in which plaintiff alleges a violation of subchapter III” instead of the more restrictive words “in the case of an action respecting a violation of subchapter III” which were chosen. In fact, if the Second Circuit is correct, any plaintiff wishing to do so could avoid delay periods and subvert the dual purposes of the statute (a) to give governmental agencies the lead in enforcing environmental regulations and (b) to avoid burdening the federal courts, by simply alleging that his lawsuit involved hazardous waste.

This Court should grant this petition and resolve, once and for all, how the notice and delay requirements in the several citizen suit statutes²⁴ should be construed and applied by the lower courts. Until it does so, the untenable condition currently prevailing will continue and citizen suit plaintiffs and defendants will continue to see inconsistent application of those requirements by the federal judiciary from circuit to circuit.

²⁴ This Court in *Hallstrom* noted some of the other federal environmental statutes having notice and delay requirements similar to those in RCRA. See *Hallstrom*, 493 U.S. at 23 n.1.

II. THE OPINION IN THIS CASE DEMONSTRATES AND REFLECTS CONTINUED CONFUSION AND INCONSISTENCY AMONG THE FEDERAL COURTS RESPECTING THE APPLICATION OF FEE-SHIFTING STATUTES UNDER FEDERAL LAW, BOTH AS TO WHEN A FEE AWARD CAN BE ORDERED AND AS TO THE LIMITS OF A COURT'S DISCRETION IN DETERMINING THE AMOUNT OF A FEE AWARD.

A. Plaintiffs did not substantially prevail at trial.

This long and complex lawsuit resulted in plaintiffs obtaining no relief at all. Before plaintiffs commenced their citizen suit actions, the City was under a state court order to install a leachate collection system and a methane control system at the landfill and to close the landfill by January 1, 1990. One of the major objectives of the City in defending plaintiffs' lawsuit was to continue operation of the landfill until the January 1, 1990 date, in the face of plaintiffs' concerted effort to force immediate closure. Plaintiffs also sought extensive other relief by their actions. The district court granted plaintiffs none of the relief sought by them and entered instead its final order requiring closure of the landfill by January 1, 1990 and announcing that plaintiffs had substantially prevailed. Thereafter, refusing to reconsider whether plaintiffs had in fact substantially prevailed, the court awarded plaintiffs' attorney's fees in the amount of \$247,534.37, which included a fully compensatory “lodestar” plus a 25% risk/contingency enhancement. The court also awarded

expenses of \$10,926.66. The Second Circuit affirmed the attorney's fees and expense award.²³

The award of attorney's fees in this case raises issues common to the application of fee-shifting provisions included in all of the federal environmental statutes, as well as the Attorney's Civil Rights Fee Awards Act, 42 U.S.C. §1988.²⁴ The issues of when a party may be deemed to have prevailed, the limits of discretion to be applied in determining downward adjustments of a "lodestar" award where plaintiffs' success is limited, and the appropriateness of enhancement are all issues that continue to confound and split the circuit courts.

B. The Prevailing Party Issue.

If, as petitioner contends, plaintiffs obtained no relief as a result of this litigation, the decisions of this Court in *Hewitt v. Helms*, 482 U.S. 755 (1987) would appear to control and require reversal of the award of attorneys fees. *Hewitt* establishes that at a minimum plaintiffs must obtain some redress – a resolution which affects the

²³ Since the Second Circuit decision, the district court has made an additional award of \$24,113 enhanced by \$6,028.25, and additional expenses of \$2,707.61. (App. 137). In addition, the Second Circuit has awarded an additional \$53,315 for attorney's fees in connection with the appeal to that court. That award is fully compensatory, but not enhanced. The court of appeals also awarded an additional \$2,240.34 in expenses. (App. 38). The total attorney's fee and expense award to date is \$346,865.23.

²⁴ This Court recognized that principles respecting fee awards in civil rights matters are applicable in the context of environmental citizens suit litigation in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 560 (1986).

behavior of the defendant towards the plaintiffs – before they can qualify as a prevailing party and holds that a mere judicial statement vindicating plaintiffs' rights is not the equivalent of redress.²⁵ *Hewitt v. Helms*, *supra* at 761-763; *see also Rhodes v. Steward*, 488 U.S. 1, 4 (1988) (an entry of judgment for plaintiff will constitute relief "if, and only if, it affects the behavior of the defendant towards the plaintiff"); *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792 (1989) (" . . . at a minimum, in order to be considered a prevailing party . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.") It follows from these decisions that what happened here – the entry of a judgment which vindicates some of the plaintiffs' allegations, but does not change the legal relationship of the parties – does not qualify the plaintiffs as prevailing parties. The City was legally obligated to close the landfill on or before January 1, 1990, at the time plaintiffs brought their actions. That obligation did not change as a result of the entry of the district court's judgment.

Even if the entry of judgment here could be viewed as the granting of some form of relief to the plaintiffs, that relief is, at best, nominal, and should not entitle plaintiffs to prevailing party status. The opinion in *Texas State Teachers' Association* left open the question of

²⁵ The Second Circuit ultimately bases its conclusion that plaintiffs met the prevailing party test on its conclusion that the "plaintiffs have achieved a significant vindication of their rights" because "[a] determination by the court that the city had violated provisions of RCRA and the CWA constitutes a change in the legal relationship of the parties that goes beyond what was contained in the Assurance." (App. 31-32).

whether nominal relief awarded to plaintiffs would qualify them as prevailing parties: "... [A] technical victory may be so near the situations addressed in *Hewitt* and *Rhodes* as to be insufficient to support prevailing party status." *Id.* at 792. That issue has now split the Circuit Courts, with the Second,²⁶ Eighth,²⁷ Ninth,²⁸ Tenth²⁹ and Eleventh³⁰ Circuits holding that an award of nominal damages in the civil rights context establishes prevailing party status and the Fifth Circuit in *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991) holding to the contrary.

C. Downward Adjustment of the Lodestar is Required.

Even if plaintiffs are entitled to prevailing party status, substantial questions remain as to whether the award of fully compensatory and enhanced fees in the light of plaintiffs very limited success is an abuse of discretion.³¹ In *Hensley v. Eckerhart*, 401 U.S. 424 (1982), this Court clearly held that where a plaintiff achieves only partial or limited success, the discretion of the court in awarding

²⁶ *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991).

²⁷ *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir. 1988).

²⁸ *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988).

²⁹ *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) cert. denied, 485 U.S. 976 (1988).

³⁰ *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987).

³¹ Had this case been settled at its outset on a stipulated judgment that the City be ordered to close the landfill on January 1, 1990 – as it surely could have been from the City's standpoint – there would be no question that an award of over \$247,000 in attorney's fees would be excessive.

fees does not extend to an award of fully compensatory lodestar fees. *Id.* at 435-437. While *Hensley* does not chart a particular course for downward adjustments in the lodestar where only limited success is obtained, it clearly requires such an adjustment.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. *This discretion, however, must be exercised in light of the considerations we have identified.*

Id., at 436 (emphasis added).

The *Hensley* decision also establishes that an enhancement of a lodestar fee is appropriate only in rare cases.

Where a plaintiff has obtained *excellent* results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of *exceptional success* an enhanced award may be justified.

Id. at 435 (emphasis added). The discretion of the district court to award enhanced fees is limited, therefore, to those cases where the result obtained surpasses excellence and attains the status of exceptional. The result in this case simply does not reach that status.

D. Enhancement of the Lodestar Was Improper.

In those rare instances where enhancement may be appropriate, the state of the law regarding a justification for enhancement is deplorable. The issue is whether the

risk of loss, where plaintiff's attorney is not being compensated aside from any recovery obtained under the fee-shifting statutes, justifies enhancement of the lodestar amount. This Court was unable to reach a majority opinion on that subject in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987). Since that case, several courts have adopted the view expressed in Justice O'Connor's concurring opinion: risk/contingency enhancement may be utilized when justified by a "difference in market treatment of contingent fee cases as a class rather than on an assessment of the 'riskiness' of any particular case." *Id.* at 731, *see, e.g., Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *Spell v. McDaniel*, 824 F.2d 1380, 1404 (4th Cir. 1987), *cert. denied sub nom. Fayetteville v. Spell*, 484 U.S. 1027 (1988); *Lattimore v. Oman Construction*, 868 F.2d 437, 439, *reh. denied*, 875 F.2d 874 (11th Cir. 1989); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53 n. 6 (1987), *vacated in part en banc*, 857 F.2d 1516 (D.C. Cir. 1988); *McKenzie v. Kennickell*, 875 F.2d 330, *reh. denied*, 884 F.2d 1405 (D.C. Cir. 1989). Stating its disagreement with those circuit courts, and inviting review by this Court,³² the Second Circuit, even though success on the part of the plaintiff was limited at best, affirmed the district court's award of enhanced fees on its assessment that given the

³² "Apart from the anomaly of the views of one justice, with whom no one concurs, being the law of the land, where the court is so divided on an issue and where there is no majority opinion at all, we conclude that the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide." App. 36.

risk of loss peculiar to this case, enhancement was justified because, the district court found, without the opportunity for enhancement this plaintiff would have faced difficulty obtaining competent counsel.

This Court should accept the invitation of the Second Circuit and grant certiorari so that it may review and clarify the law respecting when and to what extent district courts may award attorney's fees under federal fee shifting statutes.

III. THE DECISION IN THIS CASE CREATES A SPLIT AMONG THE CIRCUIT COURTS REGARDING THE SCOPE OF THE REGULATORY SCHEME ADOPTED BY CONGRESS IN THE CLEAN WATER ACT.

The Clean Water Act provides a regulatory scheme for controlling pollution of water. It does not attempt to regulate all pollution of water because such an effort would be too massive and impossible to enforce. Instead, the Act focuses on controlling and regulating certain activities which are subject to a manageable enforcement program. The key to the regulatory scheme is the identification and regulation of certain limited means - "point sources" - by which pollutants are introduced into water. (*See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 at 580-82 (6th Cir. 1988) (discussing limited scope of Clean Water Act regulatory scheme).

The opinion of the Second Circuit corrected the lower court's erroneous finding that water flows from the landfill into the Intervale through the railroad culvert (App. 84). Instead, the Second Circuit correctly observed that "any pollutants in water flowing through the culvert have already entered waters of the United States before

they flow through the culvert." (App. 22). The court of appeals nevertheless upholds the judgment that the City was in violation of 33 U.S.C. §1311(a). That opinion contradicts the plain meaning of the statutory language, contradicts opinions of other circuit courts and expands the scope of the Congressional regulatory scheme so as to make it practicably unenforceable.

The bounds of the regulatory scheme adopted by Congress is contained in the language of 33 U.S.C. §1311(a) and the statutory definitions which supplement that section. Section 1311(a) provides:

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. §1311(a).

The critical limitation on the scope of §1311 is contained in §1362(12) and (14) which provide:

Except as otherwise specifically provided, when used in this chapter:

* * *

(12) the term 'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters from any point source. . . . '

* * *

(14) the term 'point source' means any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged.

33 U.S.C. §1362(12) and (14).

The statutory language does not prohibit all additions of pollutants to waters of the United States. Nor does it purport to sanction conduct because of events taking place after a non-regulated addition of pollutants

to waters. Instead, the focus of the regulatory scheme, as expressed in the statutes, is clearly centered on the "addition" of pollutants to waters "from a point source." The regulated conduct is the use of a point source to add a pollutant to waters. Rejecting this argument, the court of appeals held that prohibited conduct occurs if, after pollutants are added to waters in a non-regulated manner, the polluted water passes through a discernible, confined and discrete conveyance.

The precise issue raised in this case was before the District of Columbia Circuit Court in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). In a thorough and carefully reasoned opinion, that court, adopting the position taken by the EPA, held that:

[A]ddition [of a pollutant] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. . . . [T]he point or nonpoint character of pollution is established when the pollutant first enters navigable water and does not change when the polluted water later passes through [a structure having the physical characteristics of a point source] . . .

Id. at 175

The same position has been taken by the Sixth Circuit in *U.S. ex rel. TVA v. Tennessee Water Quality Control Board*, 717 F.2d 992 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) and in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). Interpreting the §1362(12) and (14) definitions, the Eighth Circuit held that the "discharge of a pollutant requires an 'addition' of a pollutant from a 'point source'" *State of Missouri ex rel. Ashcroft v. Dept. of the Army*, 672 F.2d 1297, 1303-1304 (8th Cir. 1982).

The decision of the Second Circuit in this case cannot be reconciled with the opinions of the other circuit courts interpreting the same provisions of the Clean Water Act. It has the effect of amending the Act and extends the regulatory scheme to a breadth which was not envisioned by Congress when the law was enacted.

This petition should be granted so that this Court may resolve the conflict now existing between the circuit courts, thereby assuring order and uniformity of application in the administration and enforcement of the Clean Water Act.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1991

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App. 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 415 - August Term 1990

(Argued: October 29, 1990 Decided: June 12, 1991)

Docket NO. 90-7544

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, and ROSE A. BESSETTE,

Plaintiffs-Appellees,

- against -

CITY OF BURLINGTON,

Defendant-Appellant.

Before:

NEWMAN and PRATT, *Circuit Judges,*
GRIESA, *District Judge for the Southern District of*
New York, sitting by designation.

PRATT, Circuit Judge:

Plaintiffs are owners of land adjacent to the Burlington Municipal Disposal Grounds (the "landfill"). They brought this action against the City of Burlington for alleged violations of state and federal laws arising out of the operation of the landfill. Plaintiffs alleged that the operation of the landfill generally harmed the environment, and the specifically damaged their properties, by

generating methane gas, wind-blown debris, and hazardous waste. The city closed the landfill on December 31, 1989.

The plaintiffs' ten-count complaint sought injunctive relief, civil penalties, compensatory damages, and punitive damages, plus cost and attorneys' fees. Judge Billings held a bench trial on the first five counts of the complaint. Counts I, II, and III were brought pursuant to the citizen-suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972; count IV was brought pursuant to the citizen-suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365; and count V was brought pursuant to the Vermont Groundwater Protection Law, 10 Vt. Stat. Ann. § 1410.

The district court found that the City of Burlington had operated the landfill in violation of prohibitions against open dumping practices found in 42 U.S.C. § 6945(a); that the landfill may have presented an imminent and substantial endangerment to health or the environment in violation of 42 U.S.C. § 6972(a)(1)(B); and that the landfill had discharged pollutants from a point source into waters of the United States in violation of 33 U.S.C. § 1311. Liability under the remaining common law claims, count VI through X, and the issue of damages on count V, were reserved for trial by jury at a later date.

The district court denied a motion by the city to dismiss counts II, III, and part of IV of the complaint, made on the ground that plaintiffs had failed to comply with the notice and delay requirements for citizen-suits under 42 U.S.C. § 6972(a) and 33 U.S.C. § 1365(a).

In addition, the court found that the plaintiffs had substantially prevailed and awarded them total attorney's fees, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d), in the amount of \$247,534.37, which included a "lodestar" amount of \$198,027.50 plus a 25 percent risk/contingency enhancement of \$49,506.87. The court also awarded plaintiffs \$10,929.66 in expenses including expert fees.

The city appeals all of these rulings.

BACKGROUND

The City of Burlington has owned and operated the landfill since the early 1960s. The landfill is rectangular in shape and is located on approximately eleven acres of land to the north of the commercial-residential center of the city. It is bounded to the east and south by properties owned by the plaintiffs, to the north by a railroad embankment, and to the west and northwest by a marsh area called the Intervale, which has been designated a wetland, as well as by Beaver Pond, which is actually the southeast portion of the marsh. A large stone culvert runs under the railroad and connects the Beaver Pond portion of the marsh with the northeast quadrant of the Intervale.

The Intervale is in the flood plain of the Winooski River. It is inundated or saturated by surface water sufficient to support a variety of vegetation typically adapted for life in saturated soil conditions. The Intervale occasionally floods, leaving the entire area covered with surface water, including parts of the landfill itself. At normal times, water in the culvert is either in equilibrium or flows from south through the culvert. During times of

high water, however, surface water may flow from north to south through the culvert.

Trash is buried in the landfill to a depth of approximately nine feet below the ground water table on the northern edge of the landfill. Historically, rain water and run-off from the land have been able to percolate into the landfill mass. As a result, ground water mixes with and flows through contaminants in the landfill.

The landfill contains typical domestic and municipal wastes as well as materials deposited over the years by local industries. When ground water infiltrates the landfill, the water mixes with the material in the landfill and forms leachate. Leachate is a liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such wastes. The leachate is generated both by percolation of precipitation into the landfill mass and by the flow of groundwater through the refuse in the landfill. The leachate produced in the landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA. Because the landfill is unlined, the leachate enters the upper gradients or "flow tubes" of ground water under the landfill. The ground water then flows north beyond the landfill boundaries, and the flow tubes of the leachate-contaminated ground water all surface in the Intervale, north of and within 300 feet of the railroad embankment.

Leachate has also emerged from the sides of the landfill via seeps. From there, it flows into Beaver Pond and thence through the culvert under the railroad embankment and into the Intervale. The fact that leachate

from the landfill is toxic to a small fish called the fathead minnow demonstrates that the leachate also kills *Daphnia* (water fleas) and algae.

In the early 1980s, the State of Vermont began to closely scrutinize the landfill. As a result of the state's investigation, the state and the city entered into an Assurance of Discontinuance on December 15, 1981, which nominally required the city by July 1, 1984, to cease disposing of any refuse in the landfill, with the exception of residue from a planned resource recovery facility. When the city did not comply, the terms of the Assurance were amended several times, the most pertinent amendment ("Amended Assurance") occurring on January 31, 1985. It required that the city install and make operational a leachate collection system at the landfill by September 1, 1985, and that the city install and make operational a methane gas control system by December 1, 1985. It also gave the city two options: (1) select another landfill site and close the current landfill by January 1, 1988, or (2) begin operating a resource recovery facility ("RRF") and close the landfill by January 1, 1990. This Amended Assurance was entered as an order of the Chittenden Superior Court on March 7, 1985.

The city did not timely comply, however, even with the terms of the Amended Assurance. It did not install the leachate collection system or the methane gas control system until March of 1986, after the State of Vermont, on December 18, 1985, had brought an action against the city to enforce the March 7th order. Moreover, the city never notified the state in writing of its choice between the two closure options, despite its obligation to do so. While the

city's board of aldermen did adopt a resolution to pursue the RRF option, the mayor vetoed the resolution.

During the years 1985 and 1986, the state performed its own environmental assessment of the landfill, conducting substantial monitoring and testing of the area in and around the landfill, and collecting both leachate data and biological data. While the state concluded, as a result of its investigation, that the landfill did not, at that time, present an imminent and substantial endangerment to human health of the environment, it did determine that January 1, 1990, was the appropriate closure date in view of the environmental concerns presented by the landfill.

Plaintiffs filed their complaint in this matter on October 9, 1985. The day before, plaintiffs had mailed letters to the defendant city, the State of Vermont, and the Administrator of the Environmental Protection Agency (the "EPA"), notifying them of plaintiffs' contention that the city was operating the landfill in violation of sections 6925, 6930, and 6945 of RCRA, and sections 1311, 1317, and 1342 of the CWA. Plaintiffs moved for a preliminary injunction seeking immediate closing of the landfill. The case was initially referred to the Honorable Jerome J. Niedermeier, United States Magistrate for the District of Vermont, to hear and determine the motion. The city moved to dismiss the complaint primarily on the basis of failure to comply with the notice prerequisites of 42 U.S.C. § 6972(a) and 33 U.S.C. § 1365(a). The court suggested that the plaintiffs then file a proper notice under RCRA and CWA and reserved decision on the motion to dismiss. Heeding the court's suggestion, the plaintiffs filed a "supplemental" notice.

In February of 1986, the magistrate issued a Report and Recommendation, finding for purposes of the preliminary injunction motion, that the city was in violation of § 6945(a) of RCRA and § 1311(a) of the CWA. However, the magistrate recommended that the court deny plaintiffs' motion at that time and order the city to take certain specific steps toward remedying the violations. Adopting the magistrate's Report and Recommendation *in toto*, the district court denied plaintiffs' motion for a preliminary injunction and ordered the city, within sixty days, to make fully operational both a gas ventilation system and a leachate collection system for the landfill. At this point, the city complied.

After a bench trial, the district court issued its Findings of Fact, Opinion and Order. 732 F.Supp. 458. As to count I, it concluded that the city had not violated the hazardous waste permit and notification requirements of 42 U.S.C. §§ 6925(a) and 6930(a). It based this holdings on the fact that the State of Vermont had authorization to implement its own solid and hazardous waste program pursuant to 42 U.S.C. § 6926(b), and that the state's regulations superseded the requirements under RCRA. Accordingly, the court found that a direct action to enforce the RCRA regulations was not available to the plaintiffs. See *Williamsburgh-Around-the-Bridge Block Assn., et al. v. Jorling, et al.*, No. 89-CV-471, slip op. at 10 (N.D.N.Y. August 21, 1989); *Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C. 1987).

As to count II, which alleged three separate open dumping practices in violation of 42 U.S.C. § 6945(a), the court found that (a) the city had generated methane gas, in violation of 40 C.F.R. § 257.3-8(a)(2), but had abated

that practice on or about December 27, 1985, and since then had not violated this provision; (b) the city had, through a point source, discharged pollutants into waters of the United States without a permit, in violation of 40 C.F.R. § 257.3-3(a); and (c) the city had not contaminated an underground drinking water source beyond the landfill boundary, and therefore had not violated 40 C.F.R. § 257.3-4(a).

As to count III, the court held that the city had violated subchapter III (hazardous waste management provisions) and subchapter IV (solid waste management provisions) of RCRA because the landfill may have presented an imminent and substantial endangerment to health or the environment, and therefore, its continued operation violated 42 U.S.C. § 6972(a)(1)(B).

As to count IV, the court found that the city had violated the CWA by discharging pollutants from a point source (the railroad culvert) into the Intervale without authorization. Finally, as to count V, the court held that the city had violated Vermont's Groundwater Protection Law, 10 Vt. Stat. Ann. § 1410, by altering the character and quality of the groundwater beneath and north of the landfill.

Subsequently, the district court entered an Opinion and Order denying the city's motion to dismiss counts II, III, and part of IV, and it also entered an Opinion and Order granting the plaintiffs' motion for attorney's fees. The district court then entered judgment with respect to its holdings on counts I through IV, and pursuant to Fed.

R. Civ. P. 54(b), certified for appeal the judgment on the federal issues presented by these four counts. The court deferred for future action the damage issues under state law that were presented by count V.

DISCUSSION

The city raises four issues on this appeal. We turn first to the threshold issue of notice and consider (A) whether the district court erred in determining that *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), did not require dismissal of the case. If *Hallstrom* governs, and plaintiffs' mailing of the notice of suit one day before commencing this action was inadequate, we could dismiss the case on that ground alone. However, since we conclude that the district court was correct in finding that the delay requirement was inapplicable in the circumstances of this case, we must also consider the remaining issues raised by the city: (B) that the district court erred in determining that the culvert was a "point source" for purposes of finding a CWA violation; (C) that the district court incorrectly found that the landfill may present an imminent and substantial harm to health and the environment; (D) that the district court erroneously awarded attorney's fees. We shall discuss these issues separately.

A. Pre-Suit Notice

Initially, we must determine whether this action must be dismissed because the plaintiffs failed to comply with the notice and delay requirements under the citizen-suit provisions of RCRA and the CWA. See 42 U.S.C. § 6972

and 33 U.S.C. § 1365. Section 6972(a) sets forth the specific circumstances under which a citizen may commence a citizen suit, and § 6972(b) provides limitations on this ability to file suit. One type of limitation is the requirement for notice to the defendants and a time period of delay before commencing suit. This case involves three such notice provisions:

(1) Section 6972(b)(1) of RCRA, which applies to actions brought pursuant to subsection A of § 6972(a)(1), states in relevant part:

(1) No action may be commenced under subsection (a)(1)(A) of this section -

(A) prior to 60 days after the plaintiff has given notice of the violation to -

(i) the Administrator;

(ii) the state in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

* * *

42 U.S.C. § 6972(b)(1) (emphasis added).

(2) Section 6972(b)(2), which applies to actions brought pursuant to subsection B of § 6972(a)(1), provides for a 90-day delay period, but is similar to § 6972(b)(1) in all other respects. (3) Section 1365(b) of the CWA, which applies to actions brought pursuant to § 1365(a), requires a 60-day delay period after giving notice to the same relevant parties, but it does not apply if the action alleges a violation of § 1316 or § 1317(a).

To comply with these requirements, plaintiffs' attorney mailed, by first-class mail, letters notifying the defendant city, the State of Vermont, and the Administrator of the EPA of plaintiffs' contention that the city was operating the landfill in violation of 42 U.S.C. §§ 6925, 6930 and 6945 and 33 U.S.C. §§ 1311, 1317, and 1342. Plaintiffs, however, did not wait out the delay periods. In fact, the very next day, they filed their complaint with the district court. After the court found that the letter did not meet all the substantive requirements for notice under RCRA and the CWA and ordered the plaintiffs to file a proper notice, plaintiffs then mailed a "supplemental" notice, whose content satisfied the statutory requirements, but whose timing provides one of the major issues on this appeal.

The city relies on the Supreme Court's recent decision in *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), in urging that the plaintiffs' action must be dismissed because their failure to adhere to the statutory notice and delay provisions both prohibits the commencement of the action and, at the same time, deprives the district court of

subject matter jurisdiction to entertain the action. In *Hallstrom*, the Court stated that § 6972(b)'s notice and delay requirements are "mandatory conditions precedent to commencing suit under the RCRA citizen-suit provision; a District Court may not disregard these requirements at its discretion." Pointing to the clear statutory language and plaintiffs' failure to give any notice either to the Administrator or to the state where the violation occurred until after the suit commenced, the Supreme Court dismissed the complaint despite the fact that the case had gone to trial and the plaintiffs had won on the merits. *Hallstrom*, 110 S.Ct. at 311. The city here argues that the Court's refusal in *Hallstrom* to depart from the literal meaning of the notice requirements compels dismissal of the plaintiffs' complaint as "barred by the terms of the statute."

The district court rejected this argument. 733 F.Supp. 23. It held that *Hallstrom* did not control because that case did not address a situation where the plaintiffs allege a claim "respecting a violation of subchapter III", which deals with hazardous waste pollution. The court concluded the *Hallstrom* was applicable only to situations where no hazardous waste violations were alleged, and since the instant complaint raised two claims arising under subchapter III, dismissal pursuant to *Hallstrom* was not necessary.

We agree with the district court, at least to an extent sufficient to uphold the court's jurisdiction. The 1984 amendments to RCRA and the CWA, 42 U.S.C. § 6972(b) and 33 U.S.C. § 1365(b), respectively, made clear that at least plaintiffs' hazardous waste claims in count I (subchapter III violations) could be brought immediately after

giving notice to the administrator of the EPA, the state and the alleged violator. The remaining question, therefore, is whether the notice and delay requirements apply when allegations of subchapter III violations are combined with non-subchapter III claims in a single "hybird" complaint. Neither congress nor the Supreme Court in "Hallstrom" addressed the problems associated with this type of "hybird" situation.

The city argues that the Supreme Court's holding and strong language in *Hallstrom* mandate dismissal of this "hybrid" complaint. It also argues that if plaintiffs could circumvent the delay requirements by simply asserting a subchapter III claim, whether or not such a claim has merit, the congressional policy for delay would be effectively nullified.

The delay periods in the citizen-suit provisions result from a congressional compromise "between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 110 S.Ct. at 310. Compliance with the notice and delay provisions fulfills this congressional goal in two ways. First, governmental agencies can take the lead in enforcing environmental regulations, with the hope that "an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts," *Id.* Second, the alleged violator is given a nonadversarial period in which he has the opportunity to comply with the law, thus obviating the need for the citizen suit. *Id.*

In the 1984 amendments to RCRA, however, congress abrogated the delay periods when an "action" under

§ 6972 "respect[s]" a violation of the hazardous waste management provisions (subchapter III) of RCRA. 42 U.S.C. §§ 6972(b)(1)(A) and 6972(b)(1)(B). When violations of the EPA's permit requirements for hazardous wastes are involved, congress felt it necessary to carve out exceptions to the delay requirements so that citizen suits could be brought immediately. *Hallstrom*, 110 S.Ct. at 309. Congress obviously determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications for the pre-suit delay periods. It struck the balance in favor of prompt citizen enforcement of hazardous waste violations over its other policy aims of encouraging nonjudicial and nonadversarial resolution of environmental conflicts.

The district court found that under the city's interpretation, a citizen would have to choose between (1) delaying 60 days before bringing the hazardous claim so that all the claims could be brought simultaneously, or (2) filing the hazardous waste claim immediately after notice is given and then seeking leave to amend the complaint to add the remaining claims after 60 days has passed. If felt that plaintiffs with subchapter III claims should not have to make this choice. Thus, the court held that when plaintiffs have a "hybrid" complaint, the delay periods otherwise required before commencing a non-subchapter III suit become inapplicable.

The district court reasoned that the policy reasons for requiring a delay period, as identified in *Hallstrom*, were no longer important once a hazardous waste violation was alleged. First, when hazardous waste violations are involved, the interest of promoting initial governmental

enforcement action is substantially diminished, as is the preference for administrative resolution: "[T]here is no need to maintain a window of opportunity for the government to take the lead enforcement role as to non-subchapter III claims when a citizen, acting as a private attorney general, has already lawfully assumed the lead role in bringing a subchapter III claim against the same facility." 733 F.Supp. at 26. Second, when a citizen suit is filed to enforce hazardous waste violations, the citizen and the alleged violator are automatically placed in an adversarial posture; therefore, the district court concluded, the filing of a citizen suit involving subchapter III claims, immediately after giving notice, effectively eliminates the opportunity for the alleged violator to achieve compliance with the non-subchapter III claims in a non-adversarial climate.

We agree with the analysis if the district court. Although the Supreme Court's language in *Hallstrom* leans toward a strict application of the notice and delay requirement, rigid adherence in this case, which involves hazardous wastes, would lean too far, for it would circumvent congress's intent in enacting these statutes. *Hallstrom* is therefore distinguishable, because there the plaintiffs had plainly disregarded the language of the statute by filing a complaint alleging only non-subchapter III violations without mailing any notice whatsoever. Here, plaintiffs did give notice to the appropriate parties identified in the statute, and then filed their "hybird" complaint the next day, alleging violations of both subchapter III and non-subchapter III provisions.

Although the city's argument – that plaintiffs can easily circumvent the delay requirements by simply alleging a subchapter III violation, whether or not it is meritorious – does raise some concern, we do not think it outweighs congress's manifest intent to encourage quick citizen enforcement of hazardous waste violations of subchapter III. Of course, if a plaintiff should allege frivolous subchapter III claims, he would not only be subject to rule 11 sanctions, but his claims could also be dismissed early in the litigation process, and the court, by stay or dismissal, could require full observance of the delay period. Moreover, in order to eliminate the delay requirement with a "hybird" complaint, the two types of violations would have to be closely related. In this case, for example, plaintiffs' subchapter III and non-subchapter III claims all arose from the operation of a single facility and are based on the same core of interrelated facts.

In addition to its general argument that counts II and IV must be dismissed because they were filed prematurely, the city also makes more particular arguments as to why it believes that all the counts should be dismissed.

1. EPA-Authorized State Hazardous Waste Program

The city claims that RCRA's exception to the delay requirements for subchapter III actions is not applicable in Vermont because that subchapter has been superseded by Vermont's approved Hazardous Waste Management Plan pursuant to 42 U.S.C. § 6926(b). We disagree. We note initially that Plaintiffs' complaint contains two counts that allege hazardous waste violations – counts I and III. Count I was brought pursuant to subsection A of

the citizen suit provision, 42 U.S.C. § 6972(a)(1), and count III was brought pursuant to subsection B.

Within the general citizen suit provision of RCRA (§ 6972(a)(1)), two separate subsections specify two different types of actions that may be brought. Subsection A primarily addresses violations of permits, standards, regulations, and the like. Subsection B allows causes of action against those whose activities "ha[ve] contributed or * * * [are] contributing to the past or present handling, storage, treatment, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment".

Pursuant to § 6926(b), an EPA-authorized state hazardous waste program, like that in Vermont, can supersede the permit and notification requirements of subchapter III of RCRA. However, a state's own hazardous waste program affects only those actions brought pursuant to subsection A, *i.e.*, those that depend upon the specific permit and notification requirements in subchapter III. Subsection B, on the other hand, is more general, and allows a direct cause of action against those whose activities "may present an imminent and substantial endangerment to health or the environment". Thus, a subsection B suit does not depend on any specific subchapter III provision, nor is it superseded by a state program.

In this case, the district court did find that the federal permit and notification requirements of subchapter III of RCRA were superseded by the EPA-authorized state hazardous waste program, and thus, that a direct action pursuant to subsection A of the citizen suit provision to

enforce § 6925(a) and § 6930(a), as alleged in count I of plaintiffs' complaint was not available. See *Williamsburgh-Around-the-Bridge Block Assn., et al. v. Jorling, et al.*, No. 89-CV-471, slip op. at 10 (N.D.N.Y. August 21, 1989); *Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C. 1987). However, the district court also found that count III, brought pursuant to subsection B, alleged a claim "respecting a violation of subchapter III" sufficient to trigger RCRA's exception to the delay period. We are not as confident as the district court that count III was a claim "respecting a violation of subchapter III," although the defendant apparently conceded that it was. See 733 F. Supp. at 27. But count I does not cease to be sufficient to keep the "hybrid" complaint in court simply because count I ultimately proved to be unsuccessful. *Hallstrom* makes clear that the notice determination is to be made at the outset, and in this case count I survived defendant's motion for summary judgment. For this reason, the exception to the delay requirement for this "hybrid" complaint applies.

2. Commencement and Prosecution of an Action by the State

The city next argues that count II is prohibited by the provisions of subsection B of § 6972(b)(1) (not to be confused with § 6972(a)(1) discussed above), because the state had already obtained an order from a state court requiring compliance with the standards alleged to have been violated. In this connection, the state had entered into an Assurance of Discontinuance with the city, which agreement was filed and entered as an order of the state court. Subsection B of § 6972(b) does provide that if "the Administrator or State has commenced and is diligently

*prosecuting a civil or criminal action * * ** to require compliance" (emphasis added), a citizen's enforcement action cannot be commenced.

We do not think that what the state did in this situation falls within this provision. The Assurance in this case was an agreement between the state and the city that was simply filed and entered as an order of the state court. No "civil or criminal action" was ever commenced against the city to require compliance with federal regulations. Even if the Assurance were to be viewed as an action to compel compliance with federal regulations, the state could not be held to have "diligently prosecut[ed]" the action. The only thing the state ever did to try to enforce the assurance was to bring an action to compel compliance with provisions of the Assurance that required the city to install a methane gas control system and a leachate collection system. This action was not taken until the deadline for installation had already passed. The plaintiffs had already filed this action and the district court had ordered the city to install operational systems before the city complied. Beyond this one action, the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the city numerous extensions. Given these facts, the state's conduct in this case does not meet the level of diligence that would trigger the prohibition against a citizen suit. See *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985).

3. CWA Exception to Delay Requirement

The city also claims that although an exception to the 60-day delay requirement exists under § 1365 of the CWA

for actions respecting either § 1316 or § 1317(a) of the act, neither exception is applicable in this case. The city is correct because no § 1316 violation was alleged and because § 1317 imposes obligations only on the EPA administrator, not the defendant city. But the point is irrelevant. Because, as we discussed earlier in this opinion, the CWA claim was brought as part of a "hybrid" complaint, which simultaneously alleged hazardous waste violations under RCRA, there was no need to observe the 60-day delay requirement of § 1365.

4. Content Requirements of Notice Provisions

Finally, the city argues that the plaintiffs' notice did not comply with the content requirements of the statutory and regulatory notice provisions, thus mandating dismissal under *Hallstrom*. In the first place, *Hallstrom* did not address such technical criteria. Moreover, the drastic measure of dismissal should not be used at this stage of the litigation.

As a practical matter, notice in a subchapter III case accomplishes little other than notifying the appropriate governmental agencies and the alleged violator that the filing of a complaint by citizens is imminent. In contrast, in a non-subchapter III case, specific notice gives the appropriate governmental agencies an opportunity to act and the alleged violator an opportunity to comply. Because prior notice in suits involving hazardous wastes is of minimal value, dismissal should not follow in this case merely because plaintiffs failed to comply with some very technical aspects of the notice provisions. To hold otherwise not only would allow form to prevail over

substance, but also would thwart congress's purpose of providing an exception to the strict notice requirements in instances involving the heightened danger and immediacy of hazardous wastes. *See Hallstrom*, 110 S.Ct. at 309. Thus, the supplemental notice served in response to the district court's suggestion was sufficient.

B. Point Source

We next consider the issue of whether the district court erred by concluding that the railroad culvert was a point source for the discharge of pollutants and therefore that the city was violating 33 U.S.C. § 1311(a). Pollutants from the landfill directly enter Beaver Pond before flowing through the culvert into the rest of the Intervale. Both Beaver Pond and the rest of the Intervale are parts of the marsh, and both are considered navigable waters for purposes of the CWA. Thus, any pollutants in water flowing through the culvert have already entered waters of the United States before they flow through the culvert.

Section 1311(a) provides:

"Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

Section 1362(12) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source". Section 1362(14) defines a "point source" as

"any discernible, confined and discrete conveyance including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete

fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

The city contends that the railroad culvert was not a point source for the discharge of pollutants. According to the city, the definition of a point source incorporates both physical and functional characteristics. Although it acknowledges that the culvert has many of the physical characteristics of a point source, it alleges that the culvert does not meet the functional requirements, because the culvert does not "add" pollutants to navigable waters. Under this argument, pollutants would be "added" only when they are introduced into navigable waters for the first time.

The definition of a point source is to be broadly interpreted:

The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). In *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361 (D.N.H. 1985), the court held that waste materials which collected in a ditch and from there entered a brook and ultimately entered navigable waters violated § 1311(a). In *United States v. Velsicol Chemical*

Corp., 438 F.Supp. 945, 947 (W.D. Tenn. 1976), the court found discharges into the city sewer system, which, in turn, emptied into the Mississippi River to be in violation of the CWA. It rejected the argument that the pollutants must be discharged directly into navigable waters. *Id.* The fact that the defendant discharged pollutants through conveyances owned by another party was irrelevant. The court found that the defendant knew or should have known that the city sewers led directly into the Mississippi River and this was sufficient to satisfy the CWA requirements. *Id.*

Given the intended broad reach of § 1311(a), we agree with the district court that the Burlington culvert was a point source. We also note that the definition of "discharge of a pollutant" refers to "any point source" without limitation. 33 U.S.C. § 1362 (12). Since the city's landfill caused pollutants to enter Beaver Pond, and since these pollutants were then conveyed into the rest of the Intervale by the railroad culvert, the district court's conclusion that the city discharged pollutants into navigable waters from a point source properly applied the statute to findings that were not clearly erroneous.

C. Imminent and Substantial Endangerment

The city next challenges the district court's conclusion that the landfill may present an imminent and substantial endangerment to health or the environment. It asserts that there is no evidence to support the court's conclusion, because (1) the mere presence of chemicals found on the list of toxins, without regard to their concentrations, does not evidence an endangerment; (2) the

state environmental investigation concluded that the landfill and its leachate did not present an imminent and substantial endangerment to the environment; and (3) plaintiffs' expert, Dr. Reed, did not cite evidence in support of his opinion. We disagree with the city's contention that the district court erred.

Section 6972(a)(1)(B) authorizes citizens to sue an owner or operator of a disposal facility which has contributed or is contributing to the past or present "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). When congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241. RCRA's waste management requirements for disposal facilities are designed not only to prevent, but also to mitigate, endangerments to public health and the environment. *See id.*

Significantly, congress used the word "may" to preface the standard of liability: "present an imminent and substantial endangerment to health or the environment". *United States v. Price*, 668 F.2d 204, 213 (3d Cir. 1982); *United States v. Waste Industries, Inc.*, 734 F.2d 159, 166 (4th Cir. 1984). This is "expansive language", which is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." *Price*, 668 F.2d at 213-14 (emphasis added). *See also Middlesex County Board of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715,

722 (D.N.J. 1986); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1393 (D.N.H. 1985).

The statute is "basically a prospective act designed to prevent improper disposal of hazardous wastes in the future". *Waste Industries*, 734 F.2d at 166 (quoting H.R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979) ("the Eckhardt Report")). It is not specifically limited to emergency-type situations. *Waste Industries*, 734 F.2d at 165. A finding of "imminency" does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Environmental Defense Fund v. Environmental Protection Agency*, 465 F.2d 528, 535 (D.C. Cir. 1972) (quoting EPA Statement of Reasons Underlying the Registration Decisions); *Ottati & Goss*, 630 F.Supp. at 1394. Imminence refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *Price*, 668 F.2d at 213 (quoting the Eckhardt Report); *Waste Industries, Inc.*, 734 F.2d at 166.

In addition, a finding that an activity may present an imminent and substantial endangerment does not require actual harm. *United States v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984). Courts have consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm. *Ottati & Goss*, 630 F.Supp. at 1394; *United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 885 (E.D. Ark. 1980). See also *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976) ("[c]ase law and dictionary definition

agree that endanger means something less than actual harm").

The evidence presented at trial supports the district court's findings that the landfill presented an imminent and substantial endangerment to health and the environment. The landfill had been leaking hazardous chemicals into the soil, into groundwater beneath and to the north of the landfill, and into surface waters of the Intervale wetland. Even after installation and operation of the leachate collection system in 1986, at least 10 percent of the leachate, which contains toxic and hazardous chemicals, was still migrating from the landfill into the groundwater and surface water in and around the landfill. Standard bioassay techniques revealed that leachate from the landfill was toxic to freshwater aquatic life, including at least one vertebrate in the food chain. At the time it last assessed the landfill on September 21, 1988, the state determined that "the Burlington Landfill has inadequate separation distance to groundwater and inadequate isolation distance to surface water. Monitoring of both ground water and surface water has indicated impacts to water quality."

The amount and presence of toxic chemicals, including lead, found in groundwater wells have increased over time, and are bio-accumulating in the Intervale. Some of these toxic chemicals, which continue to migrate from the landfill, may have a dramatic, adverse impact on the food chain in the Intervale. While the cattails in the Intervale tend to be resistant to toxic chemicals, the marsh is a "climax" system, i.e., cattails can stand in the face of chemical insult, but when deterioration of them finally

can be seen, they will degrade quickly, and that will be "long pass the point * * * of saving the system."

In addition, the district court based its finding on (1) the fact that leachate which escaped from the landfill contained chemicals and compounds found on the EPA toxic list; (2) the fact that the state, on the basis of its independent environmental investigation in and around the landfill, had concluded that January 1, 1990, was an appropriate closing date for the landfill; and (3) "other evidence in this case, such as Dr. Reed's expert opinion".

Based on all of the foregoing, the district court properly concluded that there were sufficient circumstances that may present an imminent and substantial endangerment to health or the environment.

D. Attorneys' Fees

We now consider the city's claim that the district court abused its discretion in awarding attorney's fees. The district court awarded total attorney's fees in the amount of \$247,534.37, which included a "lodestar" amount of \$198,027.50 plus a 25 percent risk/contingency enhancement of \$49,506.87. It also allowed \$10,929.66 in expenses, including expert fees.

The city argues first that the plaintiffs were not prevailing parties or substantially prevailing parties, as required by the statute. See 42 U.S.C. § 6792; 33 U.S.C. § 1365. Second, the city argues that, even if the plaintiffs were prevailing parties, the district court erroneously awarded their attorneys the full amount of the fee requested, without a downward adjustment for limited

success. Finally, the city argues that, at the very least, the 25 percent enhancement was error. We consider each of these claims in turn.

Although we note that most of the cases cited involve the Attorney's Civil Rights Fee Awards Act, 42 U.S.C. § 1988, the principles governing fee awards under that act are applicable to the attorney's fee provisions before us because of their substantially similar language. See *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986) (*Delaware Valley I*).

1. Prevailing Party

Both RCRA and the CWA provide for an award of a reasonable attorney's fee "to the prevailing party or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6792; 33 U.S.C. § 1365. The first hurdle for plaintiffs seeking a fee award is the requirement that they be prevailing parties. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). To qualify, a plaintiff must "'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Id.* (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). See also *Texas State Teacher's Assn. v. Garland Independent School District*, 109 S.Ct. 1486, 1493 (1989) (rejecting "central issue" test and reaffirming "significant issue" test). This test has been characterized as a "generous formulation" to get plaintiffs across the statutory threshold. *Hensley*, 461 U.S. at 433.

Even with this broad interpretation, however, a plaintiff must "receive at least some relief on the merits of

his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). He "must be able to point to a resolution of the dispute which changes the legal relationship between [himself] and the defendant." *Texas Teachers*, 109 S.Ct. at 1493; *Hewitt*, 482 U.S. at 760-61; *Rhodes v. Stewart*, 109 S.Ct. 202, 203 (1988). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas Teachers*, 109 S.Ct. at 1493. Thus, success on legal claims that are "purely technical or *de minimis*" should not result in fee awards. *Id.*

We do not accept, however, the city's characterization of the plaintiffs' success in this case as "purely technical or *de minimis*". Under the *Texas Teachers* standard, the city argues, we should not only compare the relief obtained with the relief sought, but also, compare the city's legal obligations before commencement of litigation with its obligations after the district court's judgment. According to the city, plaintiffs did nothing to change the status quo, because its legal obligations had already been fixed by the Assurance of Discontinuance that was entered as an order of the state court.

Although the district court's judgment contains essentially the same remedy as the Assurance, in that both of them mandate closing the landfill by 1990, the plaintiffs did "prevail" in this action, within the federal statutory definition, because, in large part, it was the pressure generated by the plaintiffs' efforts here that caused the city to actually close the landfill.

The city had been granted extension after extension postponing the initial deadline specified in the original Assurance. The Amended Assurance was one in a series of many. The city should have closed the landfill by January 1, 1988, because it did not opt for a resource recovery facility. Instead, the city obtained more extensions and continued to operate the facility for two more years. In fact, until trial in the court below of the federal statutory claims, the city would not even concede either that the decomposition of garbage in the landfill caused the pre-December 27, 1985 explosive levels of methane gas at the landfill boundary, or that leachate, which escaped the leachate collection system, was migrating beyond the landfill boundary.

Only by bringing this suit against the city were the plaintiffs finally able to get from the city action as opposed to mere promises. "The real value of the judicial pronouncement * * * is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt*, 482 U.S. at 761 (emphasis in original). See also *Rhodes v. Stewart*, 109 S.Ct. 202, 203 (1988). We are satisfied that the plaintiffs have achieved a significant vindication of their rights under federal laws as a result of this lawsuit. *Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984).

Despite the city's assertion that such reasoning is speculation, we do not think that the district court's finding that the plaintiffs "prevailed" under the circumstances of this action is clearly erroneous. A determination by the court that the city had violated provisions of RCRA and the CWA constitutes a change in the legal

relationship of the parties that goes beyond what was contained in the Assurance.

2. Fully Compensatory Lodestar

The city's other arguments relate to "the degree of the plaintiff's overall success [which] goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*." *Gingras*, 740 F.2d at 212. The district court awarded plaintiffs' attorneys the full fee requested, which covered all time spent on all aspects of the case. It found that both the hourly rate requested and the hours expended were reasonable in light of the complexity of the litigation. The city argues that the district court erred by not limiting its award to an amount commensurate with the plaintiffs' limited success. The city claims that the award erroneously included time spent on the failed arguments on the RCRA permitting and notification requirements; the failed effort to have the landfill declared an open dump; the failed effort to obtain a preliminary injunction; the unsuccessful interlocutory appeal to this court from the order denying the preliminary injunction; and all work done on the pendent state claims for which no fees may be awarded.

Because we think there is sufficient basis for the district court's findings, we hold that the court did not abuse its discretion in awarding plaintiffs' attorneys a fully compensatory fee award. Once a party is deemed to have prevailed, a "reasonable attorney's fee" is to be determined in the exercise of the district court's discretion. *Hensley*, 461 U.S. at 437.

The starting point for calculating a reasonable attorney's fee is "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley*, 461 U.S. at 433. Adjustments to that initial estimate can be made by considering the special circumstances of each particular case. *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989); *Blum*, 465 U.S. at 888. However, there is a presumption that the lodestar figure is reasonable. *Blum*, 465 U.S. at 897.

Although "the most critical factor is the degree of success obtained", *Hensley*, 461 U.S. at 436, where a case presents a common core of facts and related legal theories, district courts should "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. See also *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1259 (2d Cir. 1987). When the issues are intertwined factually, a fully compensatory fee award is justified even where a plaintiff does not prevail on all his claims or obtain all relief requested in his complaint. *Dominic*, 822 F.2d at 1259.

When some reduction is called for, a district court generally will attempt either "to identify specific hours that should be eliminated or * * * simply reduc[e] the award to account for the limited success of the plaintiff." *Texas Teachers*, 489 U.S. at 876 (citing *Hensley*, 461 U.S. at 437). However, reductions are not always required when plaintiffs fail to succeed on every issue. Here, the district court did not abuse its discretion by determining that the complexity of this case justified a fully compensatory award. Nor did the district court err by rejecting the

city's efforts to trivialize the plaintiffs' success. There is no mathematical formula by which to compare the total number of issues with the number of issues prevailed upon. *Hensley*, 461 U.S. at 436 n. 11. All of plaintiffs' claims arose from the operation of a single facility and were "based on related legal theories." *Dominic*, 833 F.2d at 1259. There was simply no need for the district court to engage in an "artificial distribution" of attorney time between successful and unsuccessful claims. *Id.* Its lodestar award of \$198,027.50 was, under the circumstances of this case, fully justified.

3. 25 Percent Enhancement for Contingency/Risk

Finally, the city challenges the district court's grant of a 25 percent enhancement to its fully compensatory award of attorney's fees. Relying upon the contingency/risk factor, the district court found that the enhancement was justified under the circumstances of this case.

In *Hensley*, the Supreme Court stated that "in some cases of exceptional success an enhanced award may be justified." *Hensley*, 461 U.S. at 435. Since this general declaration, however, the Court has gradually narrowed the circumstances under which an enhancement might be appropriate. An enhancement is no longer justified on the basis of factors such as the novelty of the issues, the complexity of the litigation, the high quality of the representation, or the number of people benefited. *Blum*, 465 U.S. at 898-900; see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*). All these factors are considered subsumed in the calculation of the lodestar, because they are

deemed to be adequately reflected in the hourly rate and the number of hours expended on the litigation. *Blum*, 465 U.S. at 898-900; see also *Delaware Valley I*, 478 U.S. at 565.

The enhancement possibility suggested by *Hensley* has thus eroded to the point where apparently the only thing that may still justify an enhancement is the contingency/risk factor. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"). In *Delaware Valley II*, the Court grappled with the question of whether and when the risk of nonpayment could be considered in granting an enhancement to a fee award. The Court concluded that no upward adjustment was justified in that case, but the issue sharply divided the Court, resulting in an inconclusive 4-1-4 decision.

Four justices flatly rejected any multipliers or enhancements to the lodestar figure to compensate for the risk of loss under fee-shifting statutes. *Delaware Valley II*, 483 U.S. at 725-26. Justice O'Connor concurred in finding that no enhancement could be granted in the case, but refused to flatly reject multipliers in all cases. *Id.* at 731 (O'Connor, J., concurring). She felt that contingency enhancements were appropriate in some circumstances, but in a narrower class of cases than the dissent would allow. *Id.* In addition to the requirements expressed by the dissent, Justice O'Connor would also require that plaintiffs "establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* at 733. The other four justices held that courts could award contingency enhancements if the plaintiff could

establish that the case was taken on a contingent basis and that the plaintiff's attorney had been unable to mitigate the risk of nonpayment either through extracting some significant partial payment from the client or through signing on for a large prospective damage award. *Id.* at 735 (Blackmun, J., dissenting).

Given the outcome in *Delaware Valley II*, we do not view any one of the three separate opinions dispositive on the issue before us today. We note that one of the justices that heard the case is no longer on the Court. While some courts view Justice O'Connor's concurring opinion as being the controlling law, see, e.g., *Alberti v. Klevenhagen*, 1990 Westlaw 19646 (5th Cir. 1990); *Spell v. McDaniel*, 824 F.2d 1380, 1404 (4th Cir. 1987); *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1346, 1451 (3d Cir. 1988); *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53 n. 6 (D.C. Cir. 1987); *Lattimore v. Oman Construction*, 868 F.2d 437, 439 (11th Cir. 1989), we disagree. Apart from the anomaly of the views of one justice, with whom no one concurs being the law of the land, where the Court is so divided on an issue and where there is no majority opinion at all, we conclude that the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide. Thus, we are left with our own holding in *Friends of the Earth, v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987), which affirmed the approach we took in *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986).

Judge Billings, therefore, correctly relied on *Friends of the Earth*, where we stated that the critical inquiry was "whether '[w]ithout the possibility of a fee enhancement * * * competent counsel might refuse to represent clients thereby denying them effective access to the courts.'" *Id.* at 298 (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)). Applying this standard, Judge Billings found that under the fee arrangements here, plaintiffs' attorneys would not have been compensated at all unless plaintiffs had prevailed, and that the risk of not prevailing was substantial. After considering the memoranda and affidavits on file, the court also found that absent an opportunity for enhancement to balance the risk of losing entirely, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence for this difficult case in a complicated field of law. In light of these findings, the district court determined that a 25 percent enhancement was appropriate to attract competent counsel without providing a windfall. Because the court's findings are not clearly erroneous, the district court was justified in concluding that the plaintiffs' attorneys were entitled to a 25 percent enhancement.

CONCLUSION

We affirm the judgment of the district court in all respects.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 25th day of October, one thousand nine hundred and ninety-one.

PRESENT:

HONORABLE JON O. NEWMAN,

HONORABLE GEORGE C. PRATT,
Circuit Judges,

HONORABLE THOMAS P. GRIESA,
District Judge for the Southern District of New
York, sitting by designation.

-----x
ERNEST DAGUE, SR., ERNEST
DAGUE, JR., BETTY DAGUE, and
ROSE A. BESSETTE,

Plaintiffs-Appellees,

- against -

CITY OF BURLINGTON,

Defendant-Appellant.
-----x

Plaintiffs-appellees have moved for attorneys' fees and expenses in connection with their successful opposition to defendant's appeal from the judgment of the

No. 90-7544

(Filed
Oct. 25, 1991)

District Court of Vermont. By opinion filed June 12, 1991, we affirmed the district court.

Plaintiffs seek attorneys' fees for the appeal based on a "lodestar" figure of \$53,315, a claimed 25% risk enhancement of \$13,328.75, and expenses of \$2,240.34. Defendant has not opposed the motion, which was originally filed on June 26, 1991.

After due deliberation, it is ORDERED, ADJUDGED, and DECREED that the motion is granted to the extent of allowing plaintiffs the "lodestar" figure of \$53,315 and the claimed expenses of \$2,240.34, for a total of \$55,555.34. The amount requested for "risk enhancement" is denied. The "risk" involved in defending an appeal is not significant and, in the circumstances of this case, calls for no enhancement to the "lodestar" amount.

/s/ Jon O. Newman
Jon O. Newman, U.S.C.J.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

/s/ Thomas P. Griesa
Thomas P. Griesa, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,
ERNEST DAGUE, JR.,
BETTY DAGUE and
ROSE A. BESSETTE

v.

CITY OF BURLINGTON

CITY OF BURLINGTON

v.

GENERAL ELECTRIC COMPANY,
INC., BLODGETT COMPANY,
INC., EDLUND COMPANY,
INC., E.B. & A.C. WHITING
COMPANY and HAGAR
HARDWARE COMPANY

Civil Action No.
85-269

OPINION

I. Introduction

Plaintiffs bring this action against the City of Burlington ("City") for alleged violations of federal and common law arising out of operation of the Burlington Municipal Disposal Grounds ("Landfill") under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under common law theories of nuisance, negligence, strict liability and trespass. Plaintiffs seek injunctive relief, imposition of civil penalties, compensatory and punitive

damages, costs and attorney's fees. Plaintiffs allege that the operation of the Landfill has generally harmed the environment and has specifically damaged their adjoining properties by generating hazardous waste, methane gas and wind-blown debris. After the action was initiated, the City filed a third-party complaint against various companies that allegedly disposed of hazardous wastes in the Landfill.

Currently before this Court is plaintiffs' motion for preliminary injunction. The City opposed plaintiffs' motion. The companies neither appeared nor participated in the preliminary injunction proceedings. The Hon. Jerome J. Niedermeier, Magistrate for this district, considered the motion papers and issued a Report and Recommendation in which he recommended that, while the City is violating § 6945(a) of the RCRA and § 1311(a) of the CWA, the motion to enjoin the City from operating the Landfill be denied and that the City be ordered to cause its gas ventilating and leachate collection systems to become fully operational within sixty days of this Order. Magistrate's Report and Recommendation, *Dague v. City of Burlington*, Civ. No. 85-269 (D.Vt. Feb. 21, 1986). Objections to the Magistrate's Report and Recommendation have been filed by plaintiffs, by the City, and by third-party defendants General Electric Company, Inc., Hagar Hardware Company and E.B. & A.C. Whiting Company. Based upon our analysis of the case at this stage of the proceedings, we adopt the Magistrate's Report and Recommendation *in toto*. We DENY plaintiffs' motion for preliminary injunction, but we ORDER the City to bring the pollution preventive systems into full operation within sixty days from the date of this Order.

II. Findings of Fact

The Magistrate's Report contains thirteen and one half pages of detailed and extensive findings of fact. For the purposes of this preliminary injunction motion only, see *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), we adopt these findings of fact and incorporate them herein. Because our findings are binding upon this preliminary injunction proceeding only, the objections to the findings posed by defendant City and third-party defendants General Electric Company, Inc., Hagar Hardware Company and E.B. & A.C. Whiting Company are rendered inoperative. With regard to plaintiffs' objections it should be noted that "[t]he Plaintiffs agree with almost all the findings of fact made by the Magistrate." Plaintiffs' Objections to Magistrate's Report and Recommendation ("Plaintiffs' Objections") at p.5. Plaintiffs raise seven specific objections to the Magistrate's findings of fact. See Plaintiff's Objections, Attachment A. We find these objections to be *de minimus* and inconsequential. Accordingly this Court will not alter the findings of fact as set out in the Magistrate's Report and incorporated herein.

III. Discussion

The proposed conclusions contained within the Magistrate's Report were thoughtful and well-reasoned. With the additions discussed below, we adopt the Magistrate's proposed conclusions *in toto*. As the Magistrate noted, these conclusions are for the purposes of the preliminary injunction motion only. See Magistrate's Report at p. 16; *University of Texas v. Camenisch*, *supra* at 395. For that reason, the only objections which we need consider at

this juncture are those substantive objections by plaintiffs. These objections are discussed below, *seriatim*.

A. Permit and Notice Requirements of RCRA - §§ 6925(a) and 6930(a)

In order to bring a citizen suit under RCRA, plaintiffs must demonstrate that the defendant

1. is "in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to [42 U.S.C. § 6901, *et seq.*];" or
2. "has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."

42 U.S.C. § 6972(a). Plaintiffs alleged in their preliminary injunction motion that the City violated the permit and notice requirements of 42 U.S.C. §§ 6925(a) and 6930(a), respectively. The Magistrate proposed a contrary conclusion, and plaintiffs now object.

As the Magistrate noted, 42 U.S.C. § 6925(a) prohibits the "treatment, storage or disposal" of hazardous waste subsequent to November 19, 1980, except in accordance with an operating permit from the Environmental Protection Agency ("EPA"). Magistrate's Report at p. 22. Citing *United States v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984), the Magistrate found that the leaching of hazardous waste from the Landfill constitutes "disposal" within the meaning of § 6925(a). Since the Landfill has produced leachate containing hazardous contaminants subsequent

to November 19, 1980, the City ordinarily would be required to obtain an operating permit from the EPA under the provisions of § 6925(a). It was undisputed in this proceeding that the City never applied to the EPA for such a permit, nor received from either the EPA or the State of Vermont a permit to store or dispose of hazardous waste.

The Magistrate found, however, that the City was not operating the Landfill in violation of § 6925(a) because it was operating the Landfill in complete compliance with the State of Vermont permit program which was authorized by the EPA pursuant to § 6926. The State obtained various phases of interim authorization and received final authorization from the EPA to run the program in January, 1985. The evidence at the preliminary injunction hearing showed that the City was not required to obtain a permit for the Landfill under the state's hazardous waste management program, which is run by the Agency of Environmental Conservation ("AEC"):

The AEC's position is that only facilities presently handling hazardous wastes require a permit; those leaching hazardous waste [like the Landfill] do not. Mr. Maier [from the AEC] testified that he believed the State's interpretation is consistent with the federal regulations.

Magistrate's Report at p. 26.

Plaintiffs strenuously object to the conclusion that because the city is operating within Vermont's regulatory scheme, it is in compliance with § 6925(a). Plaintiffs claim that the State's hazardous waste permit program is inconsistent with the federal permit program, and that this Court should therefore find the City in violation of

§ 6925(a) as a matter of law. In particular, plaintiffs claim that by its failure to interpret the term "disposal" to mean movement of waste after it has been placed in a landfill, the AEC "tries to eliminate the 'leaking' of hazardous waste from RCRA's definition of disposal." Plaintiffs' Objections at p. 10. Citing *United States v. Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984), plaintiffs assert that the AEC thus "creates 'a gaping hole in the overall protection of the environment envisioned by Congress.'" *Id.*

Plaintiffs correctly point out that equivalency between a state program and the Federal program is one of the criteria that must be met before the EPA will authorize the state program to operate in lieu of RCRA's Hazardous Waste Management subchapter, 42 U.S.C. §§ 6921-6934. Contrary to plaintiffs' assertions, however, the overall regulatory scheme for protection of the environment envisioned by Congress clearly indicates that the determination of consistency between the federal scheme and Vermont's authorized program is one for the EPA, not the courts, to make. For instance, in order to obtain authorization for a state program, the state is to submit an application to the EPA, and after a preliminary indication of whether such program is expected to be approved and an opportunity to be heard, the EPA will publish findings regarding the suitability of the state program. 42 U.S.C. § 6926(b). The state program is authorized to operate in lieu of the Federal program under 42 U.S.C. §§ 6921-6934, including issuing permits for disposal of hazardous waste,

unless, within ninety days following submission of the application the [EPA] Administrator notifies such State that such program may not be

authorized, and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, [42 U.S.C. §§ 6921-6934]; (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

Id. (emphasis supplied). Similarly, after determining at a public hearing that a state is not administering and enforcing its authorized program in accordance with § 6926 and after notifying the state of the same, it is the EPA which shall withdraw authorization of the state program. 42 U.S.C. § 6926(e).

For these reasons, we hold that, given EPA's current authorization of Vermont's hazardous waste management program and Vermont's interpretation of the permit requirements, we cannot say at this stage of the proceedings that the City is violating § 6925(a).

Similarly, we hold that the City has not violated the notification requirements of 42 U.S.C. § 6930(a). Section 6930(a) provides that as of August 19, 1980,

any person . . . operating a facility for the treatment, storage, or disposal of [hazardous waste] shall file with the Administrator (or with the States having authorized hazardous waste permit programs under Section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person . . . No identified or listed hazardous waste

. . . may be transported, treated, stored or disposed of unless notification has been given as required under this subsection.

42 U.S.C. § 6930(a).

As the Magistrate stated, Vermont's EPA-authorized hazardous waste management program obviates the need for the City to file notification with the EPA; if notification need be filed, it should be filed with the State of Vermont. Magistrate's Report at 26. It is undisputed that the City never filed notification with Vermont. As with the permit requirements discussed above, the state is of the opinion that the notification requirement is prospective in nature and therefore does not apply to the City's pre-August 19, 1980 activities. Plaintiffs claim that the state's interpretation is inconsistent with the requirements of § 6930(a). If an inconsistency exists, however, it is a matter to be taken up by the EPA which, pursuant to 42 U.S.C. § 6926(e), may withdraw authorization of the State program after holding a public hearing. *See supra*. Accordingly, we hold that at this stage of the proceeding the City's failure to file a hazardous waste notification does not violate § 6930(a) of the RCRA.

B. Open Dump under RCRA - § 6945(a)

The Magistrate proposed that, while the Landfill was not an open dump, it was operating in violation of two open-dumping practices in violation of § 6945(a): the discharge of pollutants into waters of the United States without a National Pollutant Discharge Elimination Permit (which also constitutes the violation of the CWA, 33 U.S.C. § 1311, discussed below); and the generation of

explosive gases that exceed the lower explosive limit at the property boundary. *See* Magistrate's Report at p. 28-31. The Magistrate concluded, however, that the landfill was not an open dump because: (1) the Landfill was not included in an EPA-published inventory of all disposal sites or facilities which, pursuant to 42 U.S.C. § 6945(b), are open dumps for purposes of RCRA; and (2) the city has been operating under a Sanitary Landfill Certification issued by the State of Vermont on January 25, 1982 that specifically establishes a certification period of January 30, 1982 through January 30, 1987. Magistrate's Report at 27-28.

Plaintiffs object to the Magistrate's proposed conclusion that the Landfill is not an open dump. Section 6945 of RCRA and the regulations promulgated thereunder require either the upgrading of open dumps¹ to sanitary landfills by September 13, 1984 or, failing that, the closure of the open dump. Plaintiffs maintain that by permitting the Landfill the opportunity to operate and upgrade to a sanitary landfill after September 13, 1984, the State's certification "transgressed the five-year deadline mandated by Congress in 42 U.S.C. § 6945(a)." Plaintiffs Objections at p. 17.

An examination of the statutory scheme specified by Congress reveals that plaintiffs' assertion must fall. The five-year deadline established by Congress for converting open dumps to sanitary landfills, set forth in 42 U.S.C. § 6945(a), applies only to open dumps listed in the inventory described in § 6945(b).² Far from being "merely an administrative tool," Plaintiffs' Objections at p.3, the EPA inventory required under § 6945(b) is the mechanism mandated by Congress for determining whether a site is

an "open dump" for the purposes of the RCRA, including § 6945(a)'s five-year deadline for upgrading. *See* 42 U.S.C. § 6945(b). Because the Landfill is not on the EPA inventory of open dumps, and is currently operating under a Vermont Sanitary Landfill Certificate, we hold that the Landfill is not an open dump within the meaning of RCRA.

C. Point Source under CWA - § 1362(14)

Plaintiffs brought their CWA claim pursuant to 33 U.S.C. § 1365(a)(1), which provides for such actions against those who violate an effluent standard or limitation effective under the CWA. One such limitation prohibits "the discharge [into navigable waters of the United States] of any pollutant by any person." 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source" is defined as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The Magistrate concluded, as does this Court, that the Landfill is in violation of § 1311(a) because it has, without a permit, discharged pollutants into navigable waters from a "point source," to wit, the railroad embankment culvert on the northern border of the Landfill. *See* Magistrate's Report at p. 40.

Plaintiffs challenge the Magistrate's proposed conclusion that, while the railroad culvert is a "point source" within the meaning of the CWA, the land mass constituting the Landfill itself is not. Plaintiffs' claim that the Landfill is: "essentially a container full of hazardous wastes"; "no different than a storage lagoon or huge

storage drum"; "like a vessel or other floating craft." Plaintiffs' Objections at pp. 22-23.

The Landfill may have certain characteristics in common with these conveyances; however, it is simply not one of them. The apposite caselaw is in accord. In *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642 (E.D.Pa. 1981), the court held that "the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source." *Id.* at 655 (emphasis supplied). In the absence of any "discernible, confined and discrete conveyance" creating such a channeling or collection device in the present case, we hold that the Landfill itself does not meet the definition of "point source" as set forth in 33 U.S.C. § 1362(14).

D. Imminent and Substantial Endangerment under RCRA - § 6972(a)(1)(B).

Plaintiffs next object to the Magistrate's proposed conclusion that there is not sufficiently persuasive evidence before the Court to hold that the Landfill "may present an imminent and substantial endangerment" to the environment. Plaintiffs have brought this citizen suit in part under 42 U.S.C. § 6972(a)(1)(B), which allows any person to sue an owner or operator of a landfill "which may present an imminent and substantial endangerment to health or the environment." Plaintiffs claim that there is sufficiently persuasive evidence, including the findings that the City is violating two open-dumping criteria in its operation of the Landfill, to conclude that the standard set forth in § 6972(a)(1)(B) has been met.

This Court cannot agree. Given the conflicting expert testimony regarding the imminent and substantial danger posed by the Landfill and the disputed reliability of other evidence presented at the hearing, which included bioassay results and water samples, this Court does not now have sufficiently persuasive evidence before it to hold that the Landfill may present an imminent and substantial danger to the environment.

IV. Conclusion

The remainder of plaintiffs' objections relate to their claim that the Magistrate's proposed relief is incommensurate with the environmental law violations committed by the City in its operations of the Landfill. While there is sufficient evidence at this preliminary stage of the proceeding to find the City in violation of 42 U.S.C. § 6945(a) and 33 U.S.C. § 1311(a), we are of the opinion that it would be inappropriate to enjoin operation of the Landfill until a trial on the merits. Even if the Landfill were closed, methane gas will continue to be generated by decomposing trash. Similarly, discharge of pollutants through the railroad culvert will not be stopped by closing the Landfill. Furthermore, since the commencement of this action the City has installed a gas ventilating system that appears to be effective in preventing methane gas from migrating off the Landfill and onto the plaintiffs' property. The city is also currently installing a leachate collection system which is designed to collect 80 to 90 percent of the leachate. Accordingly, we do not find it appropriate to order either immediate closure of the Landfill pending trial or any of the other injunctive relief

sought by plaintiffs based on the violations of 42 U.S.C. § 6945(a) and 33 U.S.C. § 1311(a).

The accompanying Order includes an order that the City cause the gas ventilating system and leachate collection system to become fully operational within sixty days. These preventive systems will alleviate serious problems that have impacted and will impact the surrounding environment. A determination of what, if any, further relief is appropriate must await a full trial on the merits.

ORDER

For the reasons set forth in the accompanying Opinion, IT IS HEREBY ORDERED that: (1) plaintiffs request for preliminary injunctive relief is DENIED and (2) the City cause the Landfill's gas ventilating system and leachate collection system to become fully operational on or before May 26, 1986 which is sixty days from the date of this Order.

SO ORDERED.

Dated at Rutland in the District of Vermont this 26th day of March, 1986.

/s/ Franklin S. Billings
Franklin S. Billings
District Judge

FOOTNOTES

¹ An open dump is defined as:

any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under [42 U.S.C. 6944] and which is not a facility for the disposal of hazardous waste.

42 U.S.C. § 6903(14).

² Section 6945(a), entitled "Closing or upgrading of existing open dumps," provides:

Upon promulgation of criteria under [42 U.S.C. § 6907(a)(3)], any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid wastes or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State *which are open dumps listed in the inventory under subsection (b) of this section* shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards.

42 U.S.C. § 6945(a)(emphasis supplied).

Section 6943(a)(3) provides that, at a minimum, a state solid waste management plan "shall provide for the closing or upgrading of all existing open dumps within the State pursuant to the requirements" of § 6945. See 42 U.S.C. § 6943(a)(3).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,	:	
ERNEST DAGUE, JR.,	:	
BETTY DAGUE and	:	Civil Action
ROSE A. BESSETTE	:	No. 85-269
	:	
v.	:	Filed
CITY OF BURLINGTON	:	February 5, 1987
	:	
CITY OF BURLINGTON	:	
	:	
v.	:	
GENERAL ELECTRIC COMPANY,	:	
INC., BLODGETT COMPANY,	:	
INC., EDLUND COMPANY,	:	
INC., E.B. & A.C. WHITING	:	
COMPANY and HAGAR	:	
HARDWARE COMPANY	:	

ORDER

I. Introduction

On October 30, 1986, United States Magistrate Jerome J. Neidermeier submitted to this Court a Report and Recommendation regarding the disposition of a number of motions in this case. First, the City of Burlington ("the City") has moved, pursuant to Fed.R.Civ.P. 19 and 21, to join as necessary and indispensable parties the companies named as third-party defendants in the third-party complaint: General Electric Company, Blodgett Company, Inc., Edlund Company, E.B. & A.C. Whiting Company, Inc., and Hagar Hardware Company ("third-party defendants"). Second, the third-party defendants, with the

exception of Edlund Company, Inc., have moved to dismiss the third-party complaint on several grounds. For the reasons stated in the discussion below, the Court adopts the Report and Recommendation of the Magistrate as to the City's Rule 19 motion and recommits to the Magistrate the third-party defendants' motions to dismiss.

II. City's Rule 19 Motion

The City has moved to join the third-party defendants under Rule 19 as necessary and indispensable parties. The City's argument is that plaintiffs, acting as private attorneys general pursuant to the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C.A. 6901, *et seq.*, should not be allowed to pick and choose among potential defendants. The City argues that the third party defendants are ultimately responsible for whatever hazardous wastes might have been brought to the landfill and therefore must be parties to the lawsuit. Magistrate's Report and Recommendation, *Dague v. City of Burlington*, Civ. No. 85-269 (D.Vt. Oct. 30, 1986).

The Magistrate denied the motion, holding that third-party defendants are not indispensable parties under Rule 19. *Id.* at 3-4. He explained that Rule 19 provides that a party must be joined if "in his absence complete relief cannot be accorded among those already parties," Fed.R.Civ.P. 19(a)(1). "In this case, the City can provide all the relief that the plaintiffs seek: locating and removing all the hazardous waste at the landfill." Report and Recommendation, Oct. 30, 1986 at 3. The Magistrate added that the City actually seeks indemnification from

the third-party defendants and that is more properly the subject of a third-party action than of joinder of additional defendants in this case. *Id.*

As authority for his decision the Magistrate cites two cases. In *United States v. Price*, 523 F.Supp. 1055, 1075 (D.N.J. 1981) aff'd 688 F.2d 204 (3d Cir. 1982), an action was brought pursuant to RCRA § 7003, 42 U.S.C. § 6973 against the owners of a landfill for injunctive relief to remedy hazards created by chemical dumping. The owners moved to compel the joinder of the chemical companies that deposited waste in the landfill and the transporters that hauled the waste. Although the *Price* court "agree[d] with defendants that equitable considerations support the addition of the generators and transporters as defendants." it denied the motion.

The traditional rule is that one tortfeasor may not compel the joinder of other alleged joint tortfeasors. 7 Wright & Miller, [Federal Practice and Procedure] at § 1623. Rule 19 did not depart from that long-established principle. Advisory Committee's Note to Rule 19, 39 F.R.D. 89, 91 (1966); see *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1244-45 n. 42 (3d Cir. 1975); *Herpich v. Wallace*, 430 F.2d 792, 817 (5th Cir. 1970).

523 F.Supp. at 1075. In *United States v. Conservation Chemical Co.*, 589 F.Supp. 59 (W.D.Mo. 1984) the Court, citing *Price* with approval, denied defendant waste-generators' motion to dismiss because the plaintiff had failed to join other contributing waste-generators. *Id.* at 63. The court noted that other waste generators might be permissive parties who could be joined, pursuant to Rule 20, at the

plaintiff's option *Id.* Such parties were not, however, necessary or indispensable.

Agreeing with the analysis in the two cases discussed, the Magistrate denied the City's Rule 19 motion. The City did not object to the Magistrate's Report and Recommendation.

The Magistrate's analysis is sound, and we adopt it. The City's Rule 19 motion is DENIED.

III. Third-Party Defendants' Motion to Dismiss

Before the Magistrate, third party defendants moved to dismiss the third-party complaint. The Magistrate discussed the motions and recommended that they be denied. Report and Recommendation, October 30, 1986 at 6-12. Third-party defendants, with the exception of Blodgett Company, Inc., have filed objections to the Magistrate's Report and Recommendation. In these objections and the memoranda filed in support thereof, third-party defendants have both clarified the grounds for their initial motions to dismiss and raised additional challenges concerning standing.

There are now essentially five grounds claimed by third party defendants for dismissal:

- (1) that the original plaintiffs lack standing;
- (2) that the City lacks standing to bring the third-party complaint;
- (3) that the plaintiff's notice to the City in the original action was inadequate;
- (4) that the City's notice to third-party defendants was inadequate; and

- (5) that the City has failed to state a claim upon which relief can be granted against third-party defendants in that there is no right to indemnification under RCRA.

The City has filed neither its own objections to the Magistrate's Report and Recommendation nor any response to the third-party defendants' objections. The City's initial Memorandum in Opposition to Motion to Dismiss addressed only the notice issues raised by third-party defendants. It is now clear that third-party defendants raise additional grounds for dismissal which apparently were not fully briefed and argued before the Magistrate. Pursuant to 28 U.S.C. § 636(b)(1), therefore, the matter is recommitted to the Magistrate for additional briefing and consideration of the third-party defendants' motions to dismiss.

The City's Rule 19 motion is DENIED. The third-party defendants' motions to dismiss are recommitted to the Magistrate for additional consideration.

SO ORDERED

Dated at Rutland in the District of Vermont this 5th day of February, 1987.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

**Ernest DAGUE, Sr., Ernest Dague, Jr.,
and Betty Dague**

v.

CITY OF BURLINGTON.

Civ. No. 85-269.

United States District Court,
D. Vermont.

Oct. 16, 1989.

**FINDINGS OF FACT, OPINION
AND ORDER**

BILLINGS, Chief Judge.

Plaintiffs bring this action against the City of Burlington ("City") for alleged violations of state and federal law arising out of the operation of the Burlington Municipal Disposal Grounds ("Landfill"). Plaintiffs allege that the operation of the Landfill has generally harmed the environment, and has specifically damaged their adjoining properties, by the generation of methane gas, wind-blown debris and hazardous waste. The ten-count complaint seeks injunctive relief, imposition of civil penalties, compensatory and punitive damages, costs and attorney's fees.

Trial by court was held during the period of May 8-11, 1989 on defendant's statutory liability, and plaintiffs' relief, if any, under Counts I through V of the complaint. These counts are brought pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 (Counts I-III); the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (Count IV); and the Vermont Groundwater Protection Law, 10 Vt.Stat.Ann. § 1410 (Count V). Liability under the remaining common law claims, Counts VI through X, and the issue of damages, will be tried by jury at a later date.

For purposes of this Opinion, we presume familiarity with prior Opinions, Orders, and Reports and Recommendations in this case.

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint in this matter on October 9, 1985. The case was initially referred to the Hon. Jerome J. Niedermeier, United State Magistrate for the District of Vermont, to hear and determine plaintiffs' motion for a preliminary injunction. Plaintiffs were seeking immediate closure of the Landfill. The Magistrate heard oral arguments on the motion for a preliminary injunction on October 28, 1985, at which time the City also moved to dismiss the complaint. Several more hearings were held between November 1985 and January 1986 on plaintiffs' motion for preliminary injunction and the City's motion to dismiss.

In February of 1986, the Magistrate issued a Report and Recommendation finding, for the purpose of the

motion for a preliminary injunction, that the City was in violation of RCRA, 42 U.S.C. § 6945(a), and the CWA, 33 U.S.C. § 1311(a). However, the Magistrate recommended that the Court deny plaintiffs' motion at that time and order the City to take certain specific steps toward remedying the violations. This Court adopted the Magistrate's Report and Recommendation *in toto*. Accordingly, we denied plaintiff's motion for a preliminary injunction and ordered the City, within sixty days, to make fully operational both a gas ventilation system and a leachate collection system for the Landfill. The City complied with the Court's Opinion and Order, dated March 26, 1986.

Early in this case, the City also filed third-party complaints against several other parties. The City subsequently attempted to join these third-party defendants as co-defendants. Meanwhile, the third-party defendants sought to dismiss the third-party complaints or, alternatively, to sever the third-party action from the primary case. On February 7, 1987 and September 3, 1987, respectively, the Court denied the City's motion to join defendants and granted the third-party defendants' motion to dismiss. The City sought, but was denied, certification from the Court to allow appeal of this decision as a final partial judgment.

On May 19, 1988, the Court granted the City's motion to separate the statutory claims for trial by court, from the common law claims and damages for trial by jury. Thereafter, cross motions for summary judgment and partial summary judgment, as well as motions on evidentiary matters, were heard and decided by the Court. By the spring of 1989, discovery was completed and the court claims were scheduled for trial.

At the close of the trial, on May 11, 1989, the Court allowed the parties until June 16, 1989 to file proposed findings of fact and conclusions of law. Plaintiffs filed memoranda in this regard on June 16, 1989; defendant filed its memoranda on June 19, 1989.

FINDINGS OF FACT

Prior to the commencement of trial, plaintiffs filed a stipulation of facts, document # 204, a copy of which is attached as Appendix A. At trial, the parties agreed to incorporate the stipulations into the record, with a modification of Stipulation # 13. Accordingly, the Court incorporates herein the facts stipulated by the parties (hereinafter "Stipulations"), except that Stipulation # 13 now reads:

13. The Landfill is a highly saturated area.

In consideration of the evidence presented at trial, the exhibits and the parties' proposed findings, the Court adds the following facts:

The State of Vermont has authorization from the United States Environmental Protection Agency (EPA), pursuant to 42 U.S.C. § 6926, to operate its own solid and hazardous waste program; the State obtained various phases of interim authorization beginning in 1982, and received final authorization in January 1985. Under state statute, the legislature has delegated responsibility for the administration of Vermont's hazardous waste, solid waste and water control laws to the Secretary of the Agency of Natural Resources (formerly the Agency of

Environmental Conservation). The current Secretary, Jonathan Lash, has delegated some of this responsibility to the Commissioner of the Department of Environmental Conservation, but remains ultimately in charge of these programs.

The State takes the position that the Burlington Landfill is a solid waste landfill, not a hazardous waste storage or disposal facility. Accordingly, the State does not require the City to have a hazardous waste permit to operate the Landfill.

The January 31, 1985 Assurance of Discontinuance¹ was filed with the Chittenden Superior Court and was entered as an Order of that court on March 7, 1985. On December 18, 1985, the State of Vermont brought an action against the City in Chittenden Superior Court to enforce the March 7 Order. The State sought compliance with the provisions requiring the City to install a leachate collection system by September 1, 1985, and a methane control system by December 2, 1985. These systems did not become operational until March of 1986.

The January 31, 1985 assurance also imposed a closure option on the City - either choose another landfill site and close the Burlington Landfill by January 1, 1988, or begin operating a resource recovery facility (RRF) and close the Landfill by January 1, 1990.

The City never notified the State in writing of its choice of the two closure options despite its obligation to

¹ See Stipulation # 109.

do so in writing.² The City's Board of Aldermen did, however, adopt a resolution to pursue the RRF option. During the period from 1980 through early 1983, the City developed plans to construct a composting and recycling facility, with the State's cooperation and approval. As a result, the January 1990 closure date became effective. Subsequently, the Mayor of Burlington vetoed the aldermanic resolution electing the RRF option.

In addition to the various assurances of discontinuance and amendments thereto entered into by the City and the State, the City also received Transitional Operational Authority (TOA) from the State to operate the Landfill. The State granted the City such authority by letter dated July 31, 1987.³ The State has also performed its own environmental assessment of the Landfill.

² See Stipulation # 116.

³ The letter from the State's Department of Environmental Conservation to the City of Burlington, granting transitional authorization for the operation of the Landfill Pursuant to Act 78, states in pertinent part:

Transitional Authorization is hereby granted City of Burlington for continued operation of Burlington Landfill in accord with the previously issued Assurance of Discontinuance by this Agency. Transitional Operation Authority will remain in force until a comprehensive review of the facility required by 10 V.S.A. Section 6605a has been completed and until a decision regarding recertification of the facility under new standards required by the Act has been made.

Act 78 of the 1987 Legislative Session requires comprehensive assessment of all disposal facilities in

(Continued on following page)

Secretary Lash testified that the State conducted substantial monitoring and testing of the area in and around the Landfill, particularly the Intervale, during the years 1985 and 1986. The State collected both leachate data and biological data. As a result of its investigation, the State concluded that the Landfill did not, at that time, present an imminent and substantial endangerment to human health or the environment. However, the State also determined that January 1, 1990 was an appropriate closure date in view of the environmental concerns presented by the Landfill. According to Secretary Lash, the State still intends to enforce the January 1, 1990 closure date.

Craig Heindel, a hydrogeologist with the firm of Wagner, Heindel & Noyes, conducted studies of the surface water and groundwater flow regime in and around the Landfill. According to his studies, the flow of groundwater and surface water in the vicinity of the Landfill is horizontally from south to north. It is highly unlikely that any groundwater flows in a southerly direction beneath the Landfill.

The soils beneath the Landfill have very low permeability. There is a slight downward vertical flow beneath the Landfill, a downward flow under the railroad

(Continued from previous page)

Vermont by July 1, 1990. Burlington Landfill has been placed on the higher priority assessment list, based on information in the Solid Waste Management Section files. Assessment of all disposal facilities on the high priority list as required by 10 V.S.A. Section 6605a will be completed prior to December 31, 1988.

embankment, and a strong upward flow immediately north of the embankment. As a result, the groundwater entering the Landfill from the south, and any groundwater originating in the Landfill, flows northward and discharges into the very upper layers of the cattail marsh, immediately north of the railroad embankment.

Heindel also studied the input of water into the Intervale from various sources, including the Landfill. On average, approximately 500,000 to 600,000 gallons of water enter the Intervale per day. Of this, an average, of 1,000 gallons is groundwater from the Landfill. Other sources of water include precipitation, periodic flooding from the Winooski River, storm water discharges from the street drainage system and groundwater from Burlington's "north end," and rain water draining off the beltline highway which runs along side Intervale.

The tests conducted by the engineering firm of O'Brien & Gere reveal the presence of chemical contaminants in the groundwater and surface water north of the Landfill.⁴ Data from the O'Brien & Gere Report (Plaintiffs' Exhibit 51), as well as data processed by the City of Burlington and the State of Vermont, were summarized by plaintiffs' expert, Frank Reed, and introduced into evidence at trial (Plaintiffs' Exhibit 84).

Except for one test well located approximately 1,500 feet north of the Landfill, the test wells around the Landfill have generally shown lead concentrations well below

⁴ See Stipulations # 28-32 and Plaintiffs' Exhibit 51.

50 parts per billion.⁵ Although on isolated occasions lead concentrations of these wells have exceeded this level, the average concentrations of lead remain below. Similarly, the data derived from testing the leachate has shown lead concentrations ranging from less than 2 parts per billion in April 1986 to 14.7 parts per billion in June 1986. The last recorded data on the leachate, for tests done in November 1988, show a lead concentration of 5 parts per billion.

One groundwater test well located approximately 1,500 feet north of the Landfill (identified as well 84-4) showed increasing levels of lead since June 1987, reaching a level of 73 parts per billion in November 1988.

The leachate collection system installed by the City is approximately 90% effective. Leachate escaping the collection system moves into the groundwater and generally flows northward, emerging just beyond the railroad embankment. Most of this leachate discharges into the shallow groundwater or surface water in the Intervale, within approximately 100 to 300 feet north of the railroad embankment. Leachate from the Landfill is contaminated with hazardous pollutants. The fact that leachate from the Landfill is toxic to the fathead minnow. *Daphnia* (water flea)⁶ demonstrates that the leachate can kill a vertebrate in the food chain.

⁵ Pursuant to 40 C.F.R. § 257.3 - 4(c)(2)(i) and Appendix I thereto, the maximum contaminant level of lead permitted by the EPA is 50 parts per billion.

⁶ See Stipulation # 36 and # 37.

DISCUSSION

Counts I and II

Plaintiffs' Counts I and II are brought pursuant to the citizen suit provision of RCRA, which provides in pertinent part:

. . . any person may commence a civil action on his own behalf -

. . . against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter;

42 U.S.C. § 6972(a)(1)(A).

Plaintiffs' Count I alleges violations of RCRA's permit and notification requirements, 42 U.S.C. §§ 6925(a) and 6930(a), Count II alleges violations of RCRA's prohibition on open dumping. 42 U.S.C. § 6945(a).

1. *Permit and notification requirements under RCRA*

Plaintiffs' Count I, brought pursuant to 42 U.S.C. § 6972(a)(1)(A), alleges violations of the permit and notification requirements set forth in 42 U.S.C. §§ 6925(a) and 6930(a). Subsection 6925(a) requires owners and operators of hazardous waste facilities, existing as of

November 19, 1980, to obtain an operating permit from the EPA.⁷ Similarly, § 6930(a) requires such owners and operators to file with the EPA or the State written notification of its hazardous waste activities.⁸ It is undisputed

⁷ Subsection 6925(a) states:

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

⁸ Subsection 6930(a) states:

(a) Preliminary notification

Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. . . .

that the City never obtained a permit from the EPA or the State, in connection with its operation of the Landfill. As a threshold matter, however, we must determine whether and to what extent the City was bound by the requirements set forth in §§ 6925(a) and 6930(a).

RCRA allows states to obtain authorization from the EPA to administer their own programs for hazardous waste management. 42 U.S.C. § 6926(b). The EPA will authorize a state program if it meets the following criteria: (1) it is equivalent to the federal program under RCRA; (2) it is consistent with the federal program and other authorized state programs; and (3) it provides adequate enforcement of compliance with RCRA Subchapter III. *Id.* As we stated in our opinion dated March 26, 1986, "the determination of consistency between the federal scheme and Vermont's authorized program is one for the EPA, not the courts, to make."

Pursuant to 42 U.S.C. § 6926(e), the EPA also has the power to withdraw its authorization of a state program if it follows certain procedures, including a public hearing on the matter. Plaintiffs contend that, pursuant to 42 U.S.C. § 6972(a)(1)(A), they may directly challenge the City's operation of the Landfill without first having to seek withdrawal of the State's EPA authorization. In other words, plaintiffs argue that § 6972(a)(1)(A) allows them to bring this action against the City for violating § 6925(a) and § 6930(a) regardless of whether the State has EPA authorization and regardless of whether they have sought withdrawal of the State's EPA authorization. We disagree.

Once a state has obtained EPA authorization, its hazardous waste program operates in lieu of RCRA's Subchapter on Hazardous Waste Management, 42 U.S.C. §§ 6921-6934. 40 C.F.R. § 271.3(b). As was recently stated in *Williamsburgh-Around-the-Bridge Block Association, et al. v. Jorling, et al.*, No. 89-CV-471, slip op. at 10, 1989 WL 98631 (N.D.N.Y. August 21, 1989) "[b]y their own terms, the hazardous waste regulations promulgated under RCRA applicable to owners and operators do not apply in states with their own RCRA hazardous waste programs." The regulatory requirements under RCRA are superseded by state regulations in those states having EPA authorization. See *Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C.1987). Therefore, a plaintiff seeking to challenge the operation of a hazardous waste site in an EPA authorized state may bring an action under state law, not federal law, or may seek revocation of the EPA's authorization; a direct action to enforce the RCRA permit requirement under § 6925(a) is not available.

The State of Vermont has an EPA authorized hazardous waste program pursuant to 42 U.S.C. § 6926. The State obtained various phases of interim authorization beginning in 1982, and received final authorizations from the EPA in January of 1985. By granting Vermont final authorization, the EPA implicitly determined that Vermont's program was equivalent to the federal program, consistent with federal and state programs in other states, and adequate in its enforcement mechanisms.

The Vermont Agency of Natural Resources administers the state programs, as authorized by the EPA. The state program operates in lieu of the federal program. The State does not require the City to obtain a federal

permit under 42 U.S.C. § 6925(a), nor is such a requirement imposed under 42 U.S.C. § 6972(a)(1)(A). Plaintiffs, therefore, have failed to prove the City in violation of the permit requirements of 42 U.S.C. § 6925(a).

Similarly, the City has not violated the notification requirements of 42 U.S.C. § 6930(a). Pursuant to this subsection, any person, as of August 19, 1980, "... owning or operating a facility for treatment, storage, or disposal of [hazardous waste] shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person." 42 U.S.C. § 6930(a).

As noted earlier, the City has never filed notification with the EPA under § 6930(a). As indicated by the language of the statute, however, Vermont's authorization from the EPA for its hazardous waste program obviates the need for the City to file with the EPA pursuant 42 U.S.C. § 6930(a). Such notification, if required by the State, would have to be filed with the State, not the EPA. The State takes the position that the notification requirement in § 6930(a) does not apply to the City's pre-August 19, 1980 activities because the statute is prospective in nature. To the extent that plaintiffs dispute this position, they may seek recourse with the EPA, which has the power to revoke the State's authorization under 42 U.S.C. § 6926(e). In this action, however, we do not find the City in violation of the notification requirements of subsection 6930(a) because we think the federal provision is, in this instance, superseded by state law.

2. *Prohibition on open dumping under RCRA*

Plaintiffs bring Count II of the complaint pursuant to 42 U.S.C. § 6972(a)(1)(A) on grounds that the City has been engaging in open dumping of solid and hazardous waste, as prohibited under 42 U.S.C. § 6945(a)⁹ and regulations set forth in Part 257 of title 40 of the Code of

⁹ Subsection 6945(a) states:

(a) Closing or upgrading of existing open dumps

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) of this section shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 6907(a)(3) of this title).

Federal Regulations. Section 257.3-1 through 257.3-8 of C.F.R. title 40 contains certain criteria for classification of solid waste disposal facilities and practices; practices that fail to satisfy these criteria constitute open dumping, and violate 42 U.S.C. § 6945(a). 40 C.F.R. § 257.1(a)(2).

Specifically, plaintiffs allege the following three practices violate the open dumping provisions of RCRA: (a) the generation of methane gas in concentrations above the safety limit set forth at 40 C.F.R. § 257.3-8(a)(2); (b) the discharge of pollutants into waters of the United States in violation of the surface water criterion set forth at 40 C.F.R. § 257.3-3(a); and (c) the contamination of an underground drinking water source beyond the Landfill boundary in violation of 40 C.F.R. § 257.3-4(a).

a. Generation of methane gas

Plaintiffs allege that in the past the Landfill generated methane gas in concentrations exceeding the safety criterion in 40 C.F.R. § 257.3-8(a)(2), in violation of 42 U.S.C. § 6945(a). It is undisputed that prior to December 27, 1985, test wells near the Landfill, including some on the plaintiffs' property, showed concentrations of methane gas exceeding the so-called "lower explosive limit" in force under RCRA for methane gas concentrations.¹⁰

In earlier proceedings on plaintiffs' motion for a preliminary injunction, the City disputed the fact that the Landfill caused the pre-December 27, 1985 occurrence of methane gas at the sites around the Landfill. However,

¹⁰ See Stipulations #78-#96.

we adopted the Magistrate's finding that such a causal connection did exist. We concluded, at that time, that the City was in violation of this open dumping prohibition. We again hold that until December 27, 1985, the Landfill was producing methane gas in concentrations exceeding the lower explosive limit of RCRA, in violation of the prohibition on open dumping practices under 42 U.S.C. § 6945(a).

Sometime in December 1985, the City began installing the gas ventilation system at the Landfill. On March 26, 1986 we ordered the City to make the system fully operational within sixty days. About that time, the system did become fully operational. Since then, the gas ventilation system installed by the City has substantially alleviated the methane gas problem caused by the Landfill. The monitoring test wells, which before December 27, 1985 showed concentrations of methane gas above RCRA's lower explosive limit, have since then consistently shown methane gas concentrations below the lower explosive limit.¹¹ Thus, we conclude that since December 27, 1985, the City has not violated 40 C.F.R. § 257.3-8(a)(2).

b. Discharge of pollutants into waters of the United States

This open dumping issue, raised pursuant to 40 C.F.R. § 257.3-3(a), is directly related to plaintiffs' Count IV claim that the City is discharging pollutants into water of the United States in violation of the National Pollutant

¹¹ See Stipulation #96.

Discharge Elimination System (NPDES) of the Clean Water Act (CWA), 33 U.S.C. §§ 1311 and 1342. Proof of such unauthorized discharging of pollutants, in violation of 33 U.S.C. §§ 1311 and 1342, *ipso facto* establishes a violation of the surface water criterion of RCRA, 40 C.F.R. § 257.3-3(a). See *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642, 655 (E.D.Pa.1981).

We incorporate herein our discussion of Count IV below. On the basis of our conclusion that the City is violating the CWA, 33 U.S.C. §§ 1311 and 1342, we hold that the City is engaging in the open dumping practice prohibited under 40 C.F.R. § 257.3-3(a), in violation of 42 U.S.C. § 6945(a).

c. Contamination of an underground drinking water source

Plaintiffs also contend that the Landfill is contaminating an underground drinking water source beyond the boundaries of the Landfill, in violation of 40 C.F.R. § 257.3-4(a). Specifically, plaintiffs allege that the Landfill is causing an occurrence of lead in concentrations that exceed the maximum levels permitted under RCRA. This is the third form of an open dumping practice alleged by plaintiffs.

Pursuant to 40 C.F.R. § 257.3-4(c)(2)(i) and Appendix I thereto, the maximum contaminant level of lead allowed by the EPA is 50 parts per billion. According to the data compilations provided by plaintiffs' expert, the concentration of lead found in the leachate, and all but one of the test wells north of the Landfill, remained generally below this limit.

One test well located approximately 1,500 feet to the north of the Landfill (identified as well 84-4) did show significantly higher levels of lead in the groundwater, reaching a level of 73 parts per billion in November 1988. While this level clearly exceeds the federal limit of 50 parts per billion, there are many other potential sources of contaminants that may have contributed to the amount of lead detected at well 84-4. The test data shows that several wells located in the area between the Landfill and site 84-4 revealed much lower concentrations of lead than well 84-4. The evidence also indicates that leachate from the Landfill discharges into the surface water or groundwater within 100 to 300 feet north of the railroad embankment, and migrates northward at a very slow rate, if at all. Plaintiffs have not provided any direct evidence to show that the Landfill has caused the occurrence of lead at well 84-4.

Thus, there is insufficient evidence to find that the Landfill is the sole or primary source of lead occurring at well 84-4. Accordingly, we hold that plaintiffs have not met their burden of proof on their claim of open dumping in violation of 40 C.F.R. § 257.3-4(a).

Count III

Plaintiffs bring Count III of the complaint on grounds that the City, as an owner and operator of a disposal facility, has contributed in the past, and is contributing at present, to the storage, treatment or disposal of solid or hazardous wastes which may present an imminent and substantial endangerment to the public's health and the

environment. Upon determining that such an endangerment exists, the Court is authorized to order such action by the City as may be necessary to abate the endangerment. 42 U.S.C. § 6972(a)(1)(B).¹²

We considered this claim in connection with plaintiffs' earlier motion for a preliminary injunction, which we decided March 26, 1986. At that time we agreed with the Magistrate's conclusion that the evidence was insufficient to support a finding that the Landfill may present an imminent and substantial endangerment to health or the environment. Our decision was based upon the conflicting nature of the opinions presented by plaintiffs' expert, Frank Reed, and the defendant's expert, William Countryman.

Both Dr. Reed and Mr. Countryman have advanced degrees in fields related to environmental studies; they

¹² Subsection 6972(a)(1)(B) states:

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf -

....

[(1)](B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; . . .

have taught at academic institutions and have engaged in private environmental consulting. Both were qualified as experts and testified at trial.

Dr. Reed has a master's degree in biology and a Ph.D. in ecology. He testified at trial that his opinion was based on, among other things: site visits in 1985 and in April and May of 1989; studies of the Landfill including the O'Brien & Gere report and the Wagner, Heindel & Noyes study; data compiled by the City and State from water samples taken in and around the Burlington Landfill; the 167 stipulated facts in this case; and various state, federal and international regulatory standards including EPA groundwater and human health standards.

Dr. Reed visited the Landfill on several occasions in 1985 and 1989, in connection with this lawsuit. Some of the visual characteristics that he looked for in conducting his site visits included evidence of seeps, differences in the quality and quantity of vegetation present on the north and south sides of the railroad embankment, visual signs of stress on the vegetation and signs of animal activity.

Dr. Reed noted in testimony, however, that looking for visual signs of stress alone may be insufficient to assess the possible endangerment to a particular ecological system. Where, as in the case of a cattail marsh, the climax system has a high tolerance for toxic chemicals, it may only show signs of stress at a latent stage of deterioration. Dr. Reed testified, "[t]he visual deterioration of those kinds of systems occurs quickly, and it's long past the point at which you can begin to think of saving the system." Accordingly, his opinion was also based upon

analysis of chemical data derived from the groundwater and surface water in and around the Landfill, and tests of the leachate.

Dr. Reed's opinion is that "the Burlington Landfill definitely presents an imminent and substantial endangerment to the environment." His opinion at trial differed from his earlier opinion given in connection with plaintiffs' motion for a preliminary injunction. At that time, Dr. Reed testified that the Landfill "may" present an imminent and substantial endangerment to the environment.

Mr. Countryman, who has a master's degree in zoology, also conducted site visits in connection with this lawsuit and, in the 1970s, did some unrelated work at the Landfill. The bases of his opinion included: his observations at the Landfill, the stipulation of facts, general discussions with City officials, testimony presented at the preliminary injunction hearing and information he had concerning the concentrations of various contaminants in the water. In his opinion, the Landfill does not present an imminent or substantial endangerment to health or the environment.

While we do not question Mr. Countryman's expertise in the field, we note that he testified that he would want to see "evidence of stress" before rendering an opinion as to whether there was an imminent and substantial endangerment to the environment. In other words, defendant's expert would require some form of actual harm before determining that there may be an imminent and substantial endangerment to the environment. However, we hold that a finding of imminent and

substantial endangerment does not require actual harm. See *United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 885 (E.D.Ark.1980). Because the standard applied by defendant's expert was more stringent than is legally required, we think his opinion is not persuasive in this instance.

Even though the leachate collection system is approximately 90% effective, hazardous wastes are still being discharged into the soil, groundwater and surface water in and around the Landfill. Leachate escaping from the Landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA.¹³ The testimony by Secretary Lash also revealed that the State concluded that January 1, 1990 would be an appropriate closing date in view of the State's independent environmental investigation in and around the Landfill. On the basis of these facts and other evidence in this case such as Dr. Reed's expert opinion, we find that the Landfill is now in violation of 42 U.S.C. § 6972(a)(1)(B), as it may present an imminent and substantial endangerment to health or the environment.

Count IV

Count IV of the complaint is brought pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. The CWA provides for citizen suits against those who violate the Act's effluent standards or limitations. 33 U.S.C.

¹³ See Stipulations #29-#33.

§ 1365(a)(1).¹⁴ Plaintiffs specifically allege the City's operation of the Landfill violates the limitation set forth in 33 U.S.C. § 1311(a), which prohibits "the discharge of any pollutant by any person," unless authorized under the CWA. Such authorization would exist if defendant had obtained a permit for the discharge of pollutants, consistent with the requirements of 33 U.S.C. § 1342. The city has no such permit.

Almost all of the requirements of a subsection 1311(a) violation are evident in the facts, without substantial dispute. The term "discharge of a pollutant" includes the addition of any pollutant or combination of pollutants to waters of the United States from any point source. 33 U.S.C. §§ 1362(12) and 1362(7); 40 C.F.R. § 122.2 "Pollutant" is defined to include, among other things, "chemical wastes." 33 U.S.C. § 1362(6). Water samples taken in and around the Landfill indicate the presence of various chemical wastes specifically listed as toxic pollutants

¹⁴ Subsection 1365(a)(1) states:

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf -

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, . . .

under 40 C.F.R. § 401.15.¹⁵ The area adjacent to and north of the Landfill, known as the Intervale, is a wetland and constitutes "waters of the United States" as that term is broadly defined under 40 C.F.R. § 122.2. Finally, since the City has not received a permit from either the EPA or the State of Vermont, the City is not authorized to discharge pollutants into the Intervale under the CWA, 33 U.S.C. § 1342.

The last remaining question raised by plaintiffs' CWA claim is whether or not the City has been discharging pollutants into waters of the United States "from any point source." "Point source" refers to: ". . . any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged . . . [but] does not include return flows from irrigated agriculture." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. The term "point source" is to be broadly interpreted. As stated by the Tenth Circuit:

The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing *the broadest possible definition of any identifiable conveyance* from which pollutants might enter the waters of the United States.

¹⁵ See Stipulations #29-#33.

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir.1979) (emphasis added).

The culvert, through which water flows from the Landfill into the Intervale, may accurately be characterized as a "discernible, confined and discrete conveyance," and as such it is a "point source." It is irrelevant that the City does not own the land on which the culvert is located, as the statute broadly proscribes discharge from *any* point source. See *United States v. Velsicol*, 438 F.Supp. 945, 947 (W.D.Tenn.1976). For the reasons stated, we hold that the City's operation of the Landfill, without a permit issued pursuant to 33 U.S.C. § 1342, violates the Clean Water Act, 33 U.S.C. § 1311(a).

Count V

Count V of plaintiffs' complaint is brought pursuant to the Vermont Groundwater Protection Law, 10 Vt.Stat. Ann. § 1410(c), for equitable relief from alleged unreasonable harm caused by the city in altering the character and quality of the groundwater beneath and around the Landfill.

The Vermont Groundwater Protection Law reads as follows:

§ 1410. Groundwater; right of action

(a) Findings and policy. The general assembly hereby finds and declares that:

- (1) surface and subsurface water are inherently interrelated in both quality and quantity;
- (2) groundwater hydrology is a science that allows groundwater quality and quantity to be mapped and forecast;

(3) groundwater is a mobile resource that is necessarily shared among all users;

(4) all persons have a right to the beneficial use and enjoyment of groundwater free from unreasonable interference by other persons; and

(5) it is the policy of the state that the common-law doctrine of absolute ownership of groundwater is hereby abolished.

(b) Definitions.

(1) "Groundwater" means water below the land surface.

(2) "Surface water" means any water on the land surface.

(3) "Person" means any individual, partnership, company, corporation, association, unincorporated association, joint venture, trust, municipality, the state of Vermont, or any agency, department or Subdivision of the state, federal agency, or any other legal or commercial entity.

(c) Any person may maintain under this section an action for equitable relief or an action in tort to recover damages, or both, for the unreasonable harm caused by another person withdrawing, diverting or altering the character or quality of groundwater.

(d) Notwithstanding the provisions of subsection (c) of this section, a person who alters groundwater quality or character as a result of agricultural or silvicultural activities, or other activities regulated by the commissioner of the department of agriculture, shall be liable only if

the alteration was either negligent, reckless or intentional.

(e) Factors to be considered in determining the unreasonableness of any harm referred to in subsection (c), above, shall include, but need not be limited to, the following:

- (1) the purpose of the respective uses or activities affected;
- (2) the economic, social and environmental value of the respective uses, including protection of public health;
- (3) the nature and extent of the harm caused, if any;
- (4) the practicality of avoiding the harm, if any;
- (5) the practicality of adjusting the quantity or quality of water used or affected and the method of use by each party;
- (6) the maintenance or improvement of groundwater and surface water quality;
- (7) the protection of existing values of land, investments, enterprises and productive uses;
- (8) the burden and fairness of requiring a person who causes harm to bear the loss; and
- (9) the burden and fairness of requiring a person to bear the loss, who causes harm in the conduct of reasonable agricultural activities, utilizing good agricultural practices conducted in conformity with federal, state and local laws and regulations.

(f) Nothing in this section shall be construed to preclude or supplant any other statutory or common-law remedies.

10 Vt.Stat.Ann. § 1410.

In view of our findings, we conclude that leachate, which contains hazardous chemicals and is toxic to some forms of aquatic life, continues to flow into groundwater beneath and north of the Landfill. This contamination constitutes an alteration of the character and quality of the groundwater, and in consideration of the nine factors set forth above, unreasonably harms the beneficial use and enjoyment of the groundwater by other persons. Therefore, we hold that the City has been operating the Landfill in violation of 10 Vt.Stat.Ann. § 1410.

Pursuant to § 1410(c), "any person" may maintain an action for equitable relief from a violation of this statute. Plaintiffs, therefore, have standing to pursue this claim. Plaintiffs are entitled to equitable relief as provided below. They are further entitled to pursue their claims in tort, and to seek damages in a later trial by jury.

CONCLUSION

For the foregoing reasons, the Court concludes the following:

1. Defendant City of Burlington has not violated 42 U.S.C. § 6925(a) or 42 U.S.C. § 6930(a) as alleged in Count I of plaintiffs' complaint.
2. As to plaintiffs' Count II, alleging three separate open dumping practices in violation of 42 U.S.C. § 6945(a): (a) the City was generating methane gas, in violation of 40 C.F.R.

§ 257.3-8(a)(2), but abated that practice on or about December 27, 1985, and since then has not violated this provision; (b) the City continues to discharge pollutants into water of the United States without a permit, in violation of 40 C.F.R. § 257.3-3(a); and (c) the City has not contaminated an underground drinking water source beyond the Landfill boundary, in violation of 40 C.F.R. § 257.3-4(a).

3. The Landfill may present an imminent and substantial endangerment to health or the environment, and therefore its continued operation violates 42 U.S.C. § 6972(a)(1)(B), as alleged in Count III of plaintiffs' complaint.

4. The City is violating the Clean Water Act, 33 U.S.C. § 1311 by discharging pollutants into the Intervale without authorization, as alleged in Count IV of plaintiffs' complaint.

5. The City is violating Vermont's Groundwater Protection Law, 10 Vt.Stat. Ann. § 1410, by altering the character and quality of the groundwater beneath and north of the Landfill, as alleged in Count V of plaintiffs' complaint.

In view of the statutory violations found, and pursuant to the Court's enforcement powers under 42 U.S.C. § 6972(a)(1), 33 U.S.C. § 1365(a) and 10 Vt.Stat. Ann. § 1410(c), the City is hereby ordered to close the Landfill on or before January 1, 1990. Civil penalties shall not be imposed pursuant to 42 U.S.C. § 6928(g) or 33 U.S.C. § 1319(d). Having determined that plaintiffs have substantially prevailed in both their RCRA and [sic] CWA claims, the Court orders defendant to pay the costs of litigation,

including reasonable attorney and expert witness fees, to be assessed. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

SO ORDERED.

APPENDIX A STIPULATION OF FACTS

Filed May 3, 1989

1. Plaintiffs are owners of residential property located on Manhattan Drive overlooking and contiguous to the Burlington Municipal Disposal Grounds ("Landfill").

2. Defendant, City of Burlington, Vermont ("City"), has owned and operated the Landfill since at least 1961.

3. The Landfill is located on approximately eleven acres of land to the north of the commercial-residential center of the City.

4. The Landfill is rectangular in shape and is bordered to the north by a portion of the railroad embankment of the Central Vermont Railway, and to the east and south by the properties located along Manhattan Drive.

5. The Landfill is contiguous to the plaintiffs' and their neighbors' properties, along which runs a steep embankment.

6. The Landfill slopes down another fifty feet or so into what is commonly known as the Intervale.

7. The Landfill is adjacent to the Intervale.

8. Future development in the Intervale is zoned in part for recreation, conservation and open space.

9. The Intervale is the flood plain of the Winooski River.

10. The Winooski River is located approximately 3,000 feet east of the Landfill site and Lake Champlain is located approximately 2,600 feet to the southeast.

11. The Intervale has, on occasion, been flooded leaving the entire area covered with surface water, including parts of the Landfill itself.

12. The area adjacent to and north of the Landfill is a wetland, to wit: it is inundated or saturated by surface water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, i.e., a cattail marsh.

13. Before the Landfill commenced operating, the location of the Landfill was a wetland itself. The Landfill is a highly saturated area.

14. The cattail marsh and Intervale are highly saturated areas.

15. The Landfill is underlain primarily by silts and by silty fine sands.

16. The Intervale just north of the Landfill consists mostly of peat underlain by silty fine sands.

17. Groundwater flows generally from south to north and northwest through and beneath the Landfill.

18. Trash is buried in the Landfill at a depth of approximately nine feet above the groundwater table on the southern edge of the Landfill, and at a depth of

approximately nine feet below the groundwater table on the northern edge of the Landfill.

19. Groundwater mixes with and flows through contaminants in the Landfill.

20. Leachate is liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes.

21. Leachate migrating downward through the trash joins through-flowing groundwater in a northerly direction into the Intervale where flow is generally upward.

22. As early as April, 1972, the City was aware that the landfill generated leachate.

23. In or about July, 1984, the generation of leachate by percolation of precipitation into the Landfill mass is estimated to be an average of four million (4,000,000) gallons per year, or an average of 11,000 gallons per day ("GPD").

24. In or about July, 1984, on the average, maximum percolation is estimated to be 32,000 GPD, and could rise to as much as 50,000 GPD during a severely wet month.

25. In or about July, 1984, the generation of leachate by groundwater (which flows through the refuse in the Landfill) is estimated to be approximately 1,000 GPD, and could be two to four times higher.

26. The leachate generated by through-flowing groundwater and percolation through the trash flows northward through and/or beneath the railroad embankment.

27. Most of any leachate which migrates beyond the Landfill boundary reaches the surface of the Intervale within 200 to 300 feet north of the railroad embankment.

28. In June, 1984, as part of a contract with the City, the engineering firm of O'Brien and Gere installed tests wells in and around the Landfill.

29. All of the test wells north of the railroad embankment contain contaminants.

30. Leachate from the Landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA.

31. Results of analyses of samples surface water around the Landfill indicate the presence of, among other chemicals, 1, 1 dichloroethane, 1, 2 dichloroethane, carbon tetrachloride, benzene, xylene, halogenated organic compounds, tetrahydrofuran, nickel, cyanide, phenols, and 1, 1, 1 trichloroethane.

32. Results of analyses of sampled groundwater from monitoring wells around the Landfill indicate the presence of, among other chemicals, halogenated compounds, lead, tetrahydrofuran, nickel, cyanide, bis (2-ethylhexyl) phthalate, phenols, 1, 2 dichloroethane, pentachlorophenol, endosulfan sulfate, and nitrates.

33. 40 C.F.R. § 401.15 lists the "toxic pollutants" designated by the Administrator of the United States Environmental Protection Agency pursuant to 33 U.S.C. § 1317(a). The Administrator has designated those pollutants whose nature and extent of toxic effect warrant inclusion on the list and consequent limitation of release to the environment. Water test results from sampling in

and around the Landfill show the presence of the following toxic pollutants listed under 40 C.F.R. § 401.15: carbon tetrachloride, benzene, lead, toluene, cyanide, phenol, pentachlorophenol, endosulfan sulfate, 1, 1 dichloroethane, 1, 2 dichloroethane, and 1, 1, 1 trichloroethane.

34. Groundwater in the aquifer beneath and around the Landfill contains less than 10,000 mg/1 total dissolved solids.

35. Well 84-2A is located near the northern edge of the Landfill.

36. Leachate from the Landfill was evaluated for toxicity to freshwater aquatic life, using standard bio-assay techniques.

37. Leachate from the Landfill is toxic to the fathead minnow, *Daphnia* (water flea) and algae.

38. The majority of any leachate which escapes the leachate collection system enters directly directly into the shallow groundwater.

39. A culvert is "a transverse drain or waterway (as under a road, railroad, or canal)." (*Webster's Third New International Dictionary*, 553 (3d ed. 1981).

40. The city installed a leachate collection system, which is designed to prevent up to 90 percent of the leachate from leaving the Landfill.

41. The leachate collection system was designed and installed for the purpose of mitigating leachate migration problems at the Landfill.

42. Since the pump station associated with the City's leachate collection system started operating until

October 3, 1986, the amount of leachate from the Landfill pumped to the City's main sewage treatment plant was estimated to be approximately 6,161,000 gallons. This estimation was based on the hours of operation for each pump, the average pumping rate, and an estimation that the pumps pumped simultaneously for 50% of the time.

43. Leachate from the Landfill collected in a perimeter ditch from mid-December 1985 until the pump station associated with the City's leachate collection system became operable. Any leachate that was collected in this ditch was pumped back into the Landfill.

44. Between 1950 and 1979, the General Electric Company disposed of approximately 200,000 gallons of liquid containing the following hazardous wastes in drums into the Landfill:

- a. trichloroethylene, a spent halogenated solvent used in degreasing;
- b. paint solvents and lubricating oils;
- c. plating or paint sludge solids containing cadmium;
- d. acid plating solids containing chromium;
- e. paint sludge solids containing lead;
- f. electroplating sludge solids containing sulfuric acid;
- g. plating sludge solids containing chromium.

45. Between 1976 and December, 1980, the E.B. & A.C. Whiting Company disposed of approximately 20 pounds per month of degreasing solvent-soaked rags and approximately 300 pounds per month of heat-treating salt

containing lead, barium, cadmium, chromium, arsenic, and mercury into the Landfill.

46. As of January, 1978, the G.S. Blodgett Company, Inc. disposed of approximately 10 gallons per week of kerosene, 5 gallons per week of lacquer thinner, 25 gallons per week of washing solvent containing trichloroethylene, and 15 gallons per week of toluene into the Landfill.

47. In 1978, the Edlund Company terminated its practice of disposing of approximately 264 pounds per year of sodium cyanide into the Landfill.

48. In June, 1982, the Hagar Hardware & Paint Company notified the Vermont Agency of Environmental Conservation that it disposed of approximately 85 gallons per year of a degreaser containing petroleum distillates (kerosene), 0-dichlorobenzene, (chlorinated) phenols, and potassium hydroxide, 350 gallons per year of a cleaning power containing sodium hydroxide and phenol, and 36 gallons per year of grease and oil sludge into the Landfill.

49. Up until May 12, 1982, Hagar Hardware & Paint Company's practice was to take the grease and oil sludge generated at its machine shop to the Landfill in five-gallon buckets.

50. At the Landfill, an employee of Hagar Hardware & Paint Company would pour the grease and oil sludge out of the bucket (or pail) and into the Landfill, and then return to the Company with the bucket.

51. By letter dated July 27, 1982, the State of Vermont Agency of Environmental Conservation informed the Hagar Hardware & Paint Company that it did not

qualify for small quantity generator exemption but, rather, was classified as a large quantity generator of hazardous waste.

52. Copies of the July 27, 1982 letter were sent to Steven Goodkind and James Ogden.

53. No employee of the City ever contacted Hagar Hardware & Paint Company with respect to the disposal of its grease and oil sludge in the Landfill.

54. In July, 1984, the City's Water Resources Department placed between 8 and 11 135-pound drums of anhydrous ferric chloride at the Landfill.

55. In July, 1984, a bulldozer at the Landfill crushed approximately 3 drums containing anhydrous ferric chloride.

56. In August, 1975, the City was put on notice by the Vermont Agency of Environmental Conservation that the General Electric Company and I.H. Weisner, Inc. were potential hazardous waste producers in the Burlington area.

57. In September, 1975, the City in turn notified the General Electric Company and I.H. Weisner, Inc. that they had been listed by the Vermont Agency of Environmental Conservation as potential disposers of hazardous waste.

58. The City made no investigation as to whether those companies had disposed of hazardous waste into its Landfill.

59. Since at least January, 1978, the City knew or should have known that hazardous wastes had been disposed of into the Landfill.

60. In September, 1978, the City was notified by the Vermont Agency of Environmental Conservation that new regulations relating to solid waste management had been developed and adopted, including special requirements for sanitary landfills.

61. The notification also informed the City that hazardous wastes may not be disposed of at sanitary landfills without a special certification for those waste materials.

62. Small quantity generated hazardous wastes were disposed of in the Landfill after November 19, 1980.

63. In December, 1979, the City applied to the State of Vermont for a permit, license, or registration to operate a solid waste facility or sanitary landfill.

64. In March, 1980, the State of Vermont denied the City's application for the operation of a sanitary landfill because of "the potential for greater impact of the landfill on ground and surface waters of the Burlington Intervale and the lack of substantial evidence that this impact would not be adverse."

65. In June, 1980, the Vermont Agency of Environmental Conservation informed the City that the major reason for rejecting its application for certification was the discharge of leachate of significant concentration and indeterminant quantity into the waters of the state.

66. In connection with the denial of certification of the Landfill as a sanitary landfill, the Secretary of the Vermont Agency of Environmental Conservation informed the City by letter dated June 23, 1980: "The water samples taken both by your engineers and by ourselves indicate that leachate which is being discharged

through the culvert into the marsh and under the railroad grade is as concentrated as any we have seen in Vermont."

67. In that letter, the Secretary of the Vermont Agency of Environmental Conservation also informed the city: "We have looked only at several diagnostic parameters, but these few show clearly that very contaminated water is being discharged into the wetland directly downgradient from the landfill."

68. On January 28, 1982, the State of Vermont issued a Solid Waste Disposal Facility Certification to the City.

69. The Certification contemplated the construction and operation of a resource recovery facility.

70. The Certification was effective from January 30, 1982 through January 30, 1987.

71. The Landfill has not received a National Pollutant Discharge Elimination System permit or a permit from the State of Vermont to discharge toxic and hazardous pollutants into the wetland.

72. The Notification of Hazardous Waste Site form (submitted by the City to the EPA) is used by the EPA to locate hazardous waste sites which treated, stored, or disposed of hazardous waste in the past and at which hazardous waste is still present.

73. The City has not applied to the EPA for a permit to dispose of hazardous wastes in the Landfill.

74. The City has not received from either the EPA or the State of Vermont a permit to dispose of hazardous wastes.

75. The Landfill does not have interim status to dispose of hazardous wastes.

76. For land disposal facilities which had been granted interim status prior to November 8, 1984, interim status terminated on November 8, 1985.

77. Methane is a colorless, flammable gaseous hydrocarbon and a by-product of organic decomposition.

78. The Landfill generates methane gas.

79. Methane gas generally rises but may move in a horizontal direction when the surface of the ground is frozen.

80. In late 1984, the City installed approximately forty (40) methane gas monitoring wells at and beyond the Landfill.

81. The gas monitoring readings, taken prior to December 27, 1985, established that the flow of methane gas moved from the Landfill boundary toward Manhattan Drive.

82. Concentrations of explosive gas (methane) generated by the Landfill have exceeded the "lower explosive limit" (the lowest percent by volume of a mixture of explosive gases which will propagate a flame in air at 25°C and atmospheric pressure) for the gas at the Landfill boundary.

83. Tests taken from gas monitoring wells ("GMW") located beyond the Landfill boundary on other properties along Manhattan Drive but not on the Dague's property indicated the following:

- a. GMW#1 – between May 7, 1985 and November 29, 1985 concentrations of methane found within GMW#1 exceeded the lower explosive limit on 14 occasions;
- b. GMW#3 – between February 22, 1985 and November 29, 1985 concentrations of methane found within GMW#3 exceeded the lower explosive limit on 26 occasions;
- c. GMW#4 – between November 8, 1985 and November 14, 1985 concentrations of methane found within GMW#4 exceeded the lower explosive limit on 2 occasions;
- d. GMW#25 – between March 21, 1985 and April 25, 1985 concentrations of methane found within GMW#25 exceeded the lower explosive limit on 5 occasions;
- e. GMW#26 – between March 28, 1985 and May 30, 1985 concentrations of methane found within GMW#26 exceeded the lower explosive limit on 4 occasions;
- f. GMW#27 – between March 21, 1985 and May 30, 1985 concentrations of methane found within GMW#27 exceeded the lower explosive limit on 11 occasions;
- g. GMW#28 – between March 21, 1985 and May 30, 1985 concentrations of methane found within GMW#28 exceeded the lower explosive limit on 11 occasions;
- h. GMW#29 – between March 21, 1985 and May 9, 1985 concentrations of methane found within GMW#29 exceeded the lower explosive limit on 8 occasions;
- i. GMW#30 – between March 21, 1985 and May 17, 1985 concentrations of methane

- found within GMW#30 exceeded the lower explosive limit on 9 occasions;
 - j. GMW#31 – between March 28, 1985 and June 13, 1985 concentrations of methane found within GMW#31 exceeded the lower explosive limit on 12 occasions;
 - k. GMW#32 – between March 21, 1985 and May 17, 1985 concentrations of methane found within GMW#32 exceeded the lower explosive limit on 14 occasions;
 - l. GMW#33 – between March 21, 1985 and May 30, 1985 concentrations of methane found within GMW#33 exceeded the lower explosive limit on 11 occasions;
 - m. GMW#34 – between March 21, 1985 and June 13, 1985 concentrations of methane found within GMW#34 exceeded the lower explosive limit on 13 occasions;
 - n. GMW#35 – between March 21, 1985 and March 28, 1985 concentrations of methane found within GMW#35 exceeded the lower explosive limit on 2 occasions;
 - o. GMW#37 – between March 21, 1985 and March 28, 1985 concentrations of methane found with GMW#37 exceeded the lower explosive limit on 2 occasions;
 - p. GMW#38 – on March 28, 1985 concentrations of methane found within GWM#38 exceeded the lower explosive limit;
84. Gas monitoring wells #'s 1, 35, 37 and 38 are all located near the top of the embankment at the Landfill boundary.

85. Methane gas has seeped into the basement of Betty Dague's residence.

86. Gas well readings taken by the City from gas wells located on the Dague's property at 272 Manhattan Drive between November, 1984 and August, 1985 show at least 829 separate readings above the lower explosive limit of methane gas (4 percent gas to air or greater).

87. The City installed methane monitoring equipment in Betty Dague's residence, including a noise alarm which is set to go off when gas levels reach twenty percent of the lower explosive level.

88. Over twenty monitoring wells have also been installed throughout the Dague's yard.

89. During 1985 several of the wells contained methane gas in explosive-level concentrations.

90. In the spring, 1985, the City dug a hole (approximately 40' X 40' X 30') in the Dague's back yard in search of a methane gas channel.

91. On December 27, 1985, during the construction of the City's gas ventilating system, the City installed temporary blowers on individual wells drilled in connection with the system which were operated until the system became fully operational.

92. Thereafter, from January 4 to January 10, 1986, some of the test wells, which previously showed positive gas readings, showed no gas.

93. The City has installed a gas ventilating system which is designed to prevent the migration of methane gas away from the Landfill.

94. The gas ventilating system was designed and installed for the purpose of preventing continuing methane gas migration at the Landfill.

95. The gas ventilating system is a series of 16 perforated wells along the eastern and northern rim of the Landfill connected to a continuously operating vacuum pump. The Landfill gases, including methane, are continually collected and burned for destruction.

96. Since the installation of the gas ventilating system, the test wells on the Dague's property and other properties located along Manhattan Drive, which previously had concentrations of gas in excess of the lower explosive limit, no longer do so.

97. From March, 1980, to January, 1982, the State of Vermont permitted the City to operate the Landfill without certification.

98. During 1980 and 1981, the City developed a plan for a trash-burning plant (a Resource Recovery Facility or "RRF").

99. The December 15, 1981 Assurance of Discontinuance required the City to cease the disposal of all refuse, with the exception of the residue from a planned resource recovery facility, at the Landfill as of July 1, 1984.

100. The agreement specifically allowed the City to petition the State for an extension of the July 1, 1984 closure date if the City were unable to construct the planned resource recovery facility.

101. The agreement also obligated the City to submit engineering plans providing for methane gas control and for ground and surface water monitoring.

102. In May, 1983, the Mayor of the City vetoed an aldermanic resolution authorizing the construction of the resource recovery facility.

103. The Mayor's veto was sustained in December, 1983.

104. After deciding not to proceed with the construction of a resource recovery facility, the City requested and was granted a "limited extended operational period" for the Landfill - an extension of the July 1, 1984 closure date of the Landfill.

105. This extension was granted by way of an amendment, executed on September 12, 1984, to the December 15, 1981 Assurance of Discontinuance.

106. The September 12, 1984 amendment to the December 15, 1981 Assurance of Discontinuance required the City to upgrade the Landfill to meet certification standards in accordance with engineering plans approved by the Vermont Agency of Environmental Conservation or discontinue the disposal of solid waste by January 2, 1985. Admit, ¶ 90.)

107. The September 12, 1984 amendment to the December 15, 1981 Assurance of Discontinuance also required the City to implement several operational controls immediately in order to minimize the adverse impact of the Landfill's operations.

108. The terms and conditions of the September 12, 1984 amendment superseded and pre-empted all the

requirements of the December 15, 1981 Assurance of Discontinuance and the requirements of the Solid Waste Disposal Facility Certification issued to the City on January 28, 1982.

109. The City was again granted another extension by way of an amendment, executed on January 31, 1985, to the December 15, 1981 Assurance of Discontinuance and to the amendment executed on September 12, 1984.

110. The January 31, 1985 amendment granted the City a three-year extension of the July 1, 1984 closure date for the Landfill.

111. The terms and conditions of the January 31, 1985 amendment supersede and pre-empt: all requirements of the December 15, 1981 Assurance of Discontinuance; all requirements of the September 12, 1984 amendment to the December 15, 1981 Assurance of Discontinuance and the requirements of the Solid Waste Disposal Facility Certification issued to the City on January 28, 1982 and is in lieu of conditional certification.

112. At various times, the City has violated conditions of the December 15, 1981 Assurance of Discontinuance and the two succeeding amendments thereto.

113. Since July, 1972 the City has on occasions failed to provide adequate daily cover and compaction at the Landfill.

114. Further, a leachate collection system and methane control system were not in operation by September 1, 1985 and December 2, 1985, respectively, as required by the January 31, 1985 amendment.

115. The December 15, 1981 Assurance of Discontinuance, and subsequent amendments to it, were signed by a judge of the Vermont Superior Court, and under state law constituted an order issued by a court, the violation of which could result in the imposition of civil penalties.

116. Condition (2) of the January 31, 1985 amendment page 8, provides in part:

On or before January 1, 1987, the City shall submit a written notification to the Secretary [of the Vermont Agency of Environmental Conservation] which describes what long term disposal options the City intends to pursue. Depending upon the substance of this notification, the City shall take the following action:

(a) If the City plans to utilize a certified sanitary landfill, then the Facility [the Landfill] shall be completely closed in accordance with the Regulations on or before January 1, 1988 . . . ;

or

(b) If the City plans to utilize a resource recovery facility, but not necessarily limited to incineration, then by January 1, 1988, the City shall make a commitment which is persuasive to the Agency to guarantee that this goal is attainable. By making this commitment, the City pledges to negotiate a guaranteed start up of operation for a resource recovery facility on or before January 1, 1990. By choosing this alternative, the City commits to closing out the remaining portion of the Landfill by January 1, 1990.

117. The City did not choose to utilize a resource recovery facility pursuant to condition (2)(b) of the January 31, 1985 amendment.

118. On September 1, 1987, the City and Vermont Agency of Natural Resources (formerly known as the Vermont Agency of Environmental Conservation) entered into another amendment to the January 31, 1985 Assurance of Discontinuance.

119. The Findings of Fact of the September 1, 1987 amendment provide in part:

1. The City of Burlington has entered an agreement with H.A. Manosh, Incorporated for the purpose of assuming future solid waste disposal capacity at the Manosh landfill, a certified solid waste disposal facility, for the residents of Burlington. H.A. Manosh, Incorporated has entered a contractual agreement with the town of Stowe to dispose of wastes accepted at the Stowe municipal transfer station. . . .

3. Condition 13 of the Assurance of Discontinuance [dated January 31, 1985] between the city of Burlington and the Agency of Environmental Conservation (renamed Agency of Natural Resources by act of 1987 Vermont Legislature) limits disposal at the Burlington landfill to wastes generated within the limits of Burlington.

120. The Conditions, Requirements and Restrictions of the September 1, 1987 amendment provide:

1. The city of Burlington shall operate the Burlington landfill in accordance with the conditions of the Assurance of Discontinuance

dated January 31, 1985 except as amended below.

2. Condition 13 of the Assurance of Discontinuance is revised to read:

The disposal of solid waste at the Facility [the Landfill] shall be limited to wastes generated within the limits of the city of Burlington and the town of Stowe.

121. The September 1, 1987 amendment to the January 31, 1985 Assurance of Discontinuance was entered upon the Court records as an order of the Chittenden Superior Court pursuant to 3 V.S.A. Section 2822 by Judge Mathew I. Katz on September 28, 1987.

122. The disposal of solid waste at the Landfill now includes wastes generated not only within the limits of the City of Burlington but also within the limits of the town of Stowe.

123. The Landfill was not completely closed on or before January 1, 1988 and is still accepting solid waste for disposal.

124. The City plans to convert the Landfill into a public park after close-out finally occurs.

125. The City was notified by a State of Vermont Inspector in April, 1977 about the need to control wind-blown papers from the Landfill.

126. The Vermont Agency of Environmental Conservation notified the City by letter dated May 26, 1978 that it had "recently received a number of formal complaints about the operation [of the Landfill] in regard to daily cover and the odor of the Landfill."

127. In August, 1978, a State of Vermont inspector found inadequate cover of garbage at the Landfill.

128. In September, 1978, a State of Vermont inspector found inadequate cover of garbage at the Landfill.

129. In October and December, 1978, the City received letters directed to the Mayor of the City from the University of Vermont Department of Geology indicating an explosive gas problem at the Landfill.

130. The City received inspection reports from the Vermont Agency of Environmental Conservation in October and November, 1979 which indicated unsatisfactory amounts of daily cover being used at the Landfill.

131. In January, 1981, the City was granted permission by the Vermont Agency of Environmental Conservation to landfill approximately 300 cubic yards of sewage sludge at the Landfill.

132. In March, April, June and August, 1981, Vermont Agency of Environmental Conservation inspectors claimed to have found repeated violations of lack of daily cover at the Landfill, and notified the City of such violations. The City received an "Application Review Report" from the Vermont Agency of Environmental Conservation dated December, 1981 in which problems with inadequate cover, rodents and methane gas migration were noted in the history of the Landfill.

133. In March, 1982, the City received an inspection report from the Vermont Agency of Environmental Conservation indicating unsatisfactory amounts of daily cover being used at the Landfill.

134. In April, 1982, the City informed the Vermont Agency of Environmental Conservation that it had entered into a new contract for cover material at the Landfill, and that previous problems relating to daily cover of garbage were due to the prior supplier's inability to provide cover material.

135. In May, 1982, a Vermont Agency of Environmental Conservation inspector claimed to have found several days of garbage left uncovered and spoke to the operator of the Landfill about the problem.

136. In July, 1982, the City received a complaint from Ernest Dague, Sr. that windblown dust and ashes from the Landfill were coming into his back yard, pool and screenhouse.

137. The Vermont Agency of Environmental Conservation investigated Ernest Dague's complaint regarding dust and ashes from the Landfill in July, 1982, and spoke with Mr. John Rasys, building inspector for the City about the problem.

138. On August 4, 1982, the Vermont Agency of Environmental Conservation contacted City Streets Department Superintendent James Ogden to discuss dust control at the Landfill.

139. In February, 1983, a Vermont Agency of Environmental Conservation inspector claimed to have found deficiencies in compaction and covering of garbage at the Landfill, and discussed these problems with Mr. Ogden.

140. Following the meeting in February, 1983 with the Vermont Agency of Environmental Conservation inspector, Mr. Ogden informed the inspector that he

would take immediate action with regard to cover at the Landfill.

141. In March, 1983, a Vermont Agency of Environmental Conservation inspector claimed to have found inadequate compaction and cover of garbage at the Landfill.

142. On May 9, 1983, the City Board of Aldermen voted to send a letter to the City Street Commission expressing their displeasure with the continual unsatisfactory Landfill inspection reports from the Vermont Agency of Environmental Conservation and requesting action to correct the problems.

143. On June 21, 1983, Ernest Dague telephoned a complaint to the City that the Landfill was very dusty. The complaint form number 2016 indicates that the road was watered as a result of the complaint.

144. In July, 1984, the Vermont Agency of Environmental Conservation granted the City an extension to operate the Landfill on the condition that operational procedures be corrected.

145. In April, May, June, July and August, 1984, a Vermont Agency of Environmental Conservation inspector claimed to have found inadequate compaction and daily cover of garbage at the Landfill and informed the Landfill operator of the violation.

146. The subject of rodents, cover and compaction of cover garbage were also discussed at the August 15, 1984 meeting among Vermont Agency of Environmental Conservation and City officials.

147. On November 28, 1984, the City measured methane gas concentrations above the lower explosive limit around the houses at 256-258 Manhattan Drive.

148. As a result of the gas readings taken on November 28, 1984, additional gas wells were installed around the perimeter of the Landfill and the City began testing for methane regularly at the test wells sites.

149. On December 11, 1984, the City sent Ernest Dague, Jr. a letter regarding the levels of methane gas detected in and around his home at 272 Manhattan Drive.

150. In December, 1984, Vermont Agency of Environmental Conservation representatives met with Mr. Ogden to investigate methane gas generation at the Landfill and to inspect and supervise remedial actions taken by the City to vent methane gas away from Manhattan Drive properties.

151. The City regularly tested for methane gas along Manhattan Drive in December, 1984 and continued doing so until at least February, 1986.

152. On January 15, 1985, Messrs. Goodkind and Ogden, among others, met to discuss methane migration at the Landfill and sippage of the embankment above the Landfill.

153. In February, 1985, the City Solid Waste Task Force requested that the City Board of Aldermen place a \$2.4 million bond issue for capital improvements at the Landfill on the March, 1985 ballot.

154. The \$2.4 million bond issue was placed on the March, 1985 ballot, and was defeated by City voters.

155. On February 21, 1985, the City Board of Aldermen voted to lend a gas detection device to Ernest Dague, Jr. so that he could take readings for the presence of methane gas in his home.

156. On February 21, 1985 the City Board of Aldermen voted to refer to the City Board of Finance a proposal to pay \$500.00 per month to Ernest Dague, Jr. and to Paul Robar as compensation for methane gas problems caused by the Landfill.

157. A site inspection at the Landfill on or about February 27, 1985, revealed that coal ash was being improperly disposed of at the Landfill. In particular, coal ash was being stock-piled along with other cover material, was being used to construct an access road in the Landfill, and was not being covered properly.

158. On March 18, 1985, the City Board of Finance voted unanimously to purchase a gas detection device for the use of Ernest Dague, Jr.

159. On April 3, 1985, Mr. Goodkind notified the Superintendent of the City Parks and Recreation Department that garbage dumped by the Parks Department during the weekend would often be left uncovered at the Landfill until Monday mornings.

160. In April, 1985, the City investigated an abandoned sewer overflow line to ascertain if it had been acting as a passageway for methane being generated in the Landfill.

161. In April, 1985, Mr. Ogden informed Ernest Dague, Jr. that a hole would need to be dug in his yard to

locate a sewer overflow pipe which may have been acting as a conduit for Landfill gas.

162. The City agreed to indemnify the Dagues for damage which might be caused by the City's excavation and to restore their yard to its pre-excavation condition.

163. By letter dated April 23, 1985, the Vermont Agency of Environmental Conservation asserted that the City that methane gas generation from the Landfill was creating a nuisance and a risk of fire and explosion in and around the Landfill.

164. On April 23, 1984, the City was notified by a Vermont Agency of Environmental Conservation inspector that further cover material and compaction of garbage were needed at the Landfill.

165. In July, 1985, the City received a complaint from Donald Bessette that trees, shrubs and grass were dying on his mothers property at 310 Manhattan Drive.

166. In July, 1985, Paul Mattor, an employee of the City Health & Safety Department, investigated the complaint and found that methane gas migrating from the Landfill was entering the Bessette property at 310 Manhattan Drive and causing plant defoliation and death. Mr. Mattor also advised Mr. Bessette that he should postpone his plans to build on the embankment until the City had completed installation of its gas control system.

167. The City contracted with Abalene Pest Control which applied poisons for rodent control at the Landfill on April 19, August 2, and August 16, 1986.

Burlington, Vermont. 2 May 1989.

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UNITED STATES DISTRICT COURT

District of _____
Vermont

Betty Dague, Adminis- JUDGMENT IN A CIVIL
tratrix of the estate of CASE
Ernest Dague, Sr., et al

v.

CASE NUMBER 85-269

City of Burlington

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the city of Burlington, Vermont, close the Landfill on or before January 1, 1990. Civil penalties shall not be imposed pursuant to 42 U.S.C. § 6928(g) or 33 U.S.C. § 1319(d). The plaintiffs shall recover from the defendant the sum of \$198,027.50 for attorney fees, plus necessary expenses in the amount of \$10,929.66 together with a 25% enhancement of the total attorney's fees in the amount of \$49,506.87 plus taxable costs. Judgment is entered for the defendant as to County I; the defendant, in part, and the plaintiffs, in part, as to Count II; and the plaintiffs as to Counts III and IV.

May 7, 1990
Date

LEONARD W. LAFAYETTE
Clerk

/s/ C. Burbank
(By) Deputy Clerk
